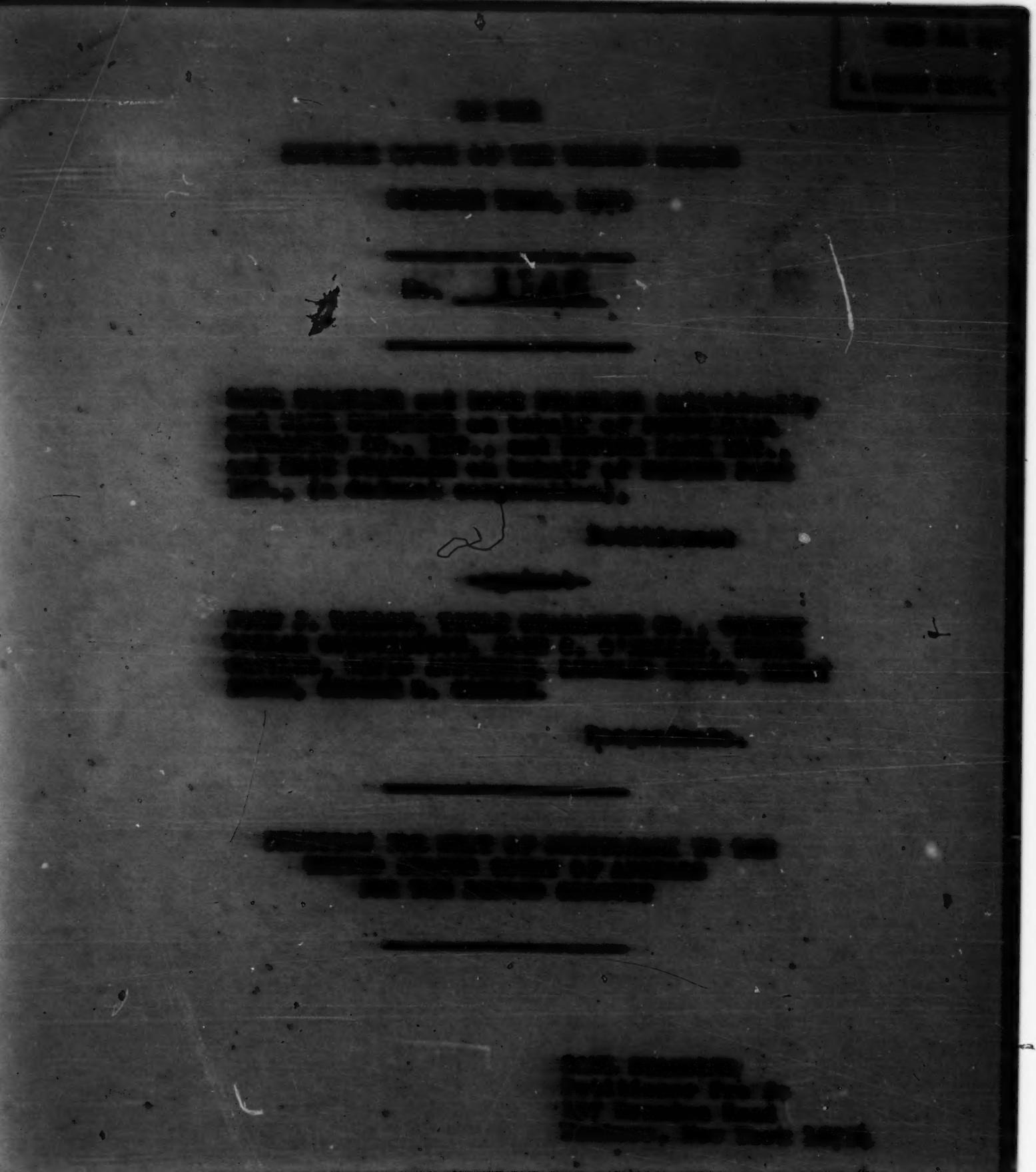

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. _____

SAUL STAMBLER and ROSE STAMBLER individually and SAUL STAMBLER on behalf of FUNDAMENTAL OPERATING CO., INC., and EMPIRE PARK INC., and ROSE STAMBLER on behalf of EMPIRE PARK INC., (a defunct corporation)

Petitioners

-against-

JOHN J. DILLON, TITLE GUARANTEE CO., COUNTY DOLLAR CORPORATION, JOHN C. O'MALLEY, PETER CASTLE, DAVID AUSTREICH, LEONARD GEISS, NANCY PETER, GEORGE B. GORDON.

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners Pro Se pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above entitled case on September 23, 1970.

The opinion of Judge McGohey ruling that the District Court had jurisdiction and that the defendant state court justice had no immunity in an action for declaratory and injunctive relief, where there is no claim for money damages against that defendant, but dismissing the complaint as too general in its charges, appears in Appendix B,* infra and is reported in 288 F. Supp. 646. The opinion of Judge Herlands' ruling that the defendant state court justice, in an action for declaratory and injunctive relief where no claim of money damage is made against that defendant, has immunity from suit and that such immunity prevents the proof of state action against the codefendants and granting summary judgment dismissing the complaint appears in Appendix B, infra and is reported in 302 F. Supp. 1250. The opinion of Judge Wyatt denying a motion to amend the judgment and for leave to serve and file a second amended complaint is unreported and appears in Appendix B. infra.

The Circuit Court of Appeals affirmed without opinion.

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* References to Appendices A, B and C attached hereto are made by reference to "A" and page number and "B" and page number and "C" and page number.

The judgment of the Circuit Court of Appeals was entered on September 23, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

STATUTES INVOLVED

The federal statutes involved are 42 U.S.C. § 1981 (R.S. § 1977), 42 U.S.C. 1982 (R.S. § 1978), 42 U.S.C. 1983 (R.S. § 1979), 42 U.S.C. 1985 (R.S. § 1980), 42 U.S.C. 1986 (R.S. § 1981), 42 U.S.C. 1994 (R.S. § 1990), as is Art. 1 Sec. 10 of the Constitution and the Fifth, Thirteenth and Fourteenth Amendments. Pertinent statutory provisions are set forth in Appendix A.

QUESTIONS PRESENTED

1.) Whether petitioner is entitled to declaratory and injunctive relief in a law-suit brought pursuant to Art 1, Sec. 10 of the Constitution, the Fifth, Thirteenth and Fourteenth Amendments and 42 U.S.C., 1981, 1982, 1983, 1985, 1986 and 1994 and 28 U.S.C. 1331, 1332, 1343, 2201 and 2202, where a state court justice made a judicial finding that petitioner was a "wrongdoer", but admitted that the allegedly wronged persons instituted no

action to invoke the jurisdiction of his Court, and made the findings of wrongdoing, contrary to the evidence before him, and thereafter used these findings as a basis to take from the petitioners property lawfully purchased by them, and thereby denied petitioners due process of law and equal protection of the law.

As to declaratory and injunctive relief the District Court (McGohey, J.)[1] ruled that the doctrine of judicial immunity did not apply and petitioners were entitled to relief in a proper case, but dismissed the complaint as too general.

The District Court (Herlands, J.)[2] ruled that the doctrine of judicial immunity granted immunity to the defendant state court justice, and further prevented proof of state action against the other defendants, not state officials, and dismissed the complaint.

The Court below affirmed without opinion.

2.) Whether in an action against a State Supreme Court Justice and others for declaratory and injunctive relief, and for damages against the others, not state officials, for violation of plaintiffs' civil rights, where one District Court Judge ruled that the

---

1 (B4)
2 (B9)

was not appealed and thus became res adjudicata, was it not substantial reversible error for another District Court Judge of concurrent jurisdiction to disregard the doctrine of "law of the case" and overrule the first judge's decision and hold there was judicial immunity and use his ruling as the basis for dismissal of plaintiffs' action against all defendants and thereby effectively denying the petitioners a trial on the merits.

The Court below affirmed without opinion.

3.) Whether the act of a state court justice, sitting as a trier of the facts without a jury, repeatedly making findings contrary to the evidence, and quoting facts out of context, to create a picture of wrongdoing and evil intent, supplies the evidence of "purposeful discrimination" necessary to invoke the Equal Protection Clause of the Fourteenth Amendment.

The District Court ruled the allegations frivolous.

The Court below affirmed without opinion.

4.) Whether the action of a state court justice in effect legislated a bill of attainder in violation of Article 1 Section 10 of the United States Constitution where he admitted that the allegedly defrauded persons had

has invoked the jurisdiction of his court and made findings that one of the plaintiff's was a wrongdoer and then granted judgment against all persons associated with that plaintiff, despite the fact that there was no evidence offered of any wrongdoing in the first place. This issue was ignored by the District Court and affirmed by the Court below without opinion.

5.) Whether it was error and an abuse of discretion under all circumstances for the District Court to deny the plaintiff the opportunity to present testimony to show that the following statement by a state court justice:-

> "While it is true that the persons who assigned the stock in Empire Park, Inc., and who executed affidavits to effectuate a conveyance of the gore have not instituted the present action, the court is of the opinion that the doctrine enunciated in the above cited cases should be utilized to protect the interests of those persons who actually sustained damages because of Stambler's wrongful acts."

was an admission by that state court justice that he knew he was acting without jurisdiction and that his conduct came within the exception to the doctrine of judicial immunity as stated by this Court in Bradley v Fisher 80 U.S. 335, 351 as follows:

THE SUBJECT-MATTER ANY AUTHORITY EXERCISED IS A USURPED AUTHORITY, FOR THE EXERCISE OF SUCH AUTHORITY, WHEN THE WANT OF JURISDICTION IS KNOWN TO THE JUDGE, NO EXCUSE IS PERMISSIBLE."

The Court below affirmed without opinion.

6.) Whether the making of findings, by a state court justice, on subject matter of transactions, where he admits that no action is before him is the lack of subject matter jurisdiction which denies him immunity from suit pursuant to Bradley v Fisher, supra.

One district court judge ruled the state court justice had no immunity from suits for declaratory and injunctive relief.

The second district court judge ruled that the state court justice had immunity from any suit. Both judges dismissed the complaint.

The Court below affirmed without opinion.

7.) Where the rules of equity limit the imposition of a constructive trust to those who violate a pre-existing fiduciary or confidential relationship for their personal unjust enrichment, does the application by the state court justice, of the rules, governing violators of fiduciary or confidential relationship to one dealing at arms length and admittedly not a fiduciary, violate the due process clause of the Fourteenth Amendment and supply

the state action required under 42 U.S.C. 1983.

The District Court could see no violation of civil or constitutional rights.

The Court below affirmed without opinion.

8.) Whether the District Court committed substantial reversible error when it ruled as frivolous the claim that where there was no fiduciary relationship between the parties, and the relationship was that of vendor-purchaser, a state court justice could convert such arms-length dealing to a master and servant relationship, and compel the vendor to return to the purchaser the purchase price of the land as well as the land itself, thereby creating involuntary servitude in violation of the Thirteenth Amendment.

The Court below affirmed without opinion.

9.) Whether the District Court erred in denying the petitioner a trial on the merits and dismissed the complaint against the petitioner who sought declaratory and injunctive relief against a state court justice pursuant to the Thirteenth and Fourteenth Amendments and 42 U.S.C. 1983, on a charge of conspiracy between the state court justice in Westchester County, New York and the other defendants, where the complaint alleged overt acts of all of the defendants to convert a vendor-purchaser

relationship between the defendant Wasylec and plaintiff into one of master and servant, and to decree that the consideration paid by Wasylec was a payment for services and granting judgment that the plaintiffs must repay the consideration while permitting Wasylec to retain the land purchased, and thereby denied petitioners due process of law.

The Court below affirmed without opinion the judgment dismissing the complaint, and petitioner was prevented from going to trial on this issue.

10.) Whether the District Court in denying the petitioners a trial on the merits and dismissed the complaint against the petitioners in an action brought pursuant to the Thirteenth and Fourteenth Amendments and 42 U.S.C. 1983 and 1985 for declaratory and injunctive relief against all the defendants and damages against defendants not state officials, where the complaint alleges that these defendants conspired with a state court justice to take from the petitioners property lawfully purchased and to have the state court justice deliver the property to these defendants and to deny the petitioners due process of law.

The District Court found that the complaint alleged that the state court justice acted without jurisdiction, but ruled that the state court justice had

immunity and that the immunity prevented the proof of state action and denied the petitioners the right to a trial on the merits.

11.) Whether an action for declaratory and injunctive relief brought pursuant to 42 U.S.C., 1981 and 1982, the Thirteenth and the equal protection clause of the Fourteenth Amendment, based on the application of inaposite law and use of findings contrary to evidence, supply the necessary discrimination to afford relief. The District Court ruled that only discrimination because of color or race permit relief under 42 U.S.C. 1981 and 1982.

The Court below affirmed without opinion.

12.) Whether in an action for declaratory and injunctive relief brought pursuant to 42 U.S.C. 1983, 1985 and 1994 and the Thirteenth and Fourteenth Amendments, where the complaint alleges a conspiracy by the defendants to deprive the plaintiffs of their liberty and property, without due process of law, and where the defendant state court justice made findings and rulings on subject matter where the jurisdiction of his Court had not been invoked and used such findings and rulings as the basis for granting a judgment in an action properly before him. The District Court ruled

that the doctrine of judicial immunity precluded the proof of state action and dismissed the complaint.

The Court below affirmed without opinion.

13.) Whether the Court of Appeals in affirming the judgment of the District Court, left in conflict the two opposing decisions of judges in the District Court, has so far departed from the accepted and usual course of judicial proceedings, and has so sanctioned such a departure by a lower court as to call for an exercise of this Court's power of supervision. The Court of Appeals gave no reason for affirming the District Court's judgment.

14.) Whether the Court of Appeals erred in affirming an order of the District Court denying a motion to serve and file an amended complaint where the District Court gave no reason for denying the motion.

15.) Whether in an action where the plaintiffs' charge a conspiracy to deprive them of their liberty and property without due process, did the District Court err in denying the petitioners a trial on the merits.

The Court below affirmed without opinion.

16.) Whether a District Court erred in granting a motion to dismiss a complaint against a plaintiff who sought declaratory and injunctive relief where the complaint charges a conspiracy between a state court justice

in Westchester County, New York, and a Title Insurance Company and other defendants - where the complaint alleged that the state court justice acted when he knew he lacked subject matter jurisdiction, and admitted knowing the jurisdiction of his court was not invoked, and where the complaint alleged that he made findings contrary to evidence to camouflage his acts in the conspiracy to deprive the plaintiffs of their liberty and property without due process of law, and declared one of the plaintiffs a wrongdoer in the subject matter of transactions where his jurisdiction was not invoked, and used such findings as a basis to declare that "no one should be permitted to profit from his wrongful acts" and thereupon granted judgment depriving the plaintiffs of their property, lawfully purchased, and decreed them in service to some of the defendants.

The Court below affirmed without opinion.

17.) Whether it was error and an abuse of discretion under all the circumstances by the District Court to deny the plaintiffs the right to amend their complaint to allege action pursuant to state law by the defendants, not state officials, and thereby show the state action necessary for relief under the Fourteenth Amendment and 42 U.S.C. 1983.

The Court below affirmed without opinion.

STATEMENT

The petitioner Saul Stambler has been found guilty of fraud and misrepresentation (C21) without a trial by a state court justice, the defendant John J. Dillon. There was no complaint by the alleged victims of the fraud and misrepresentation (C21) nor did they testify that they conveyed their interests because of representations. These alleged victims never made any claim that they sold shares of stock held by them for other than the monetary consideration.

That this was so is admitted by the defendant justice, when he admitted that these alleged victims instituted no action (C21) by which they invoked the jurisdiction of his Court.

This judicial officer without complaint or evidence decreed petitioners acts wrongful (C21) and ruled "no one should be permitted to profit from his own wrongful acts" (C23) and declared the title received by the petitioner was encumbered (C18) tho admitting that the petitioner paid for it (C18), and also granted judgment against petitioner's wife and the corporate entities owned by petitioner and his wife. (C23)

The complaint alleges that the defendants conspired to deprive these petitioners of their liberty and property without due process of law. The complaint

alleges that this finding of guilt of fraud and misrepresentation was completely unsubstantiated and contrary to the evidence presented to the defendant justice and was one of the overt acts in the conspiracy. (C11)

The purpose of the conspiracy was to aid the defendant Title Guarantee Co., to avoid paying a claim on a title that it had insured. This title covered a parcel of land actually owned at the time by Empire Park, Inc., (a dissolved corporation). (C15)

The defendant Wasylec had purchased part of the strip parcel of land from petitioner Stambler (Prudential Operating Co., Inc., successor in interest to Empire Park Inc., a dissolved corporation). (C 18) This purchase was also insured by Title Guarantee Co.

Both instituted actions against the petitioner directly or thru the corporate owner of the land. (C19)

The complaint alleges that the consolidation of these actions was an overt act in the conspiracy. (C8)

The complaint alleges that the petitioners were denied the basic safeguard of the due process clause of the Fifth and Fourteenth Amendments. (C5)

The complaint alleges that the petitioners were deprived of their rights without due process of law and subjected to involuntary servitude or deprived of their liberty and property and attached to the complaint as an exhibit is the decision (C15) of the defendant Justice Dillon and direct the attention of this Court to the fact

that where any doubt existed on any issue, that doubt was resolved against the petitioners.

This is an action by a husband and wife who charged that under the color of state law they were deprived of their liberty and property in an action in a state court because they acquired title to some land, part of which had already been appropriated by one of the defendants with the aid of another defendant. (C15)

They sought declaratory and injunctive relief against all of the defendants, and damages against all the defendants except the defendant John J. Dillon, a justice of the Supreme Court of the State of New York, Westchester County. They sought this relief pursuant to Art I Sec 10 of the Constitution, the Fifth, Thirteenth and Fourteenth Amendments, 28 U.S.C. 1331, 1332, 1343, 2201, 2202 and 42 U.S.C. 1981, 1982, 1983, 1985, 1986 and 1994. (C1) on the grounds that all the defendants conspired to use the states legal machinery to take from them what they had legally purchased under the color or a judgment to be rendered by the defendant Dillon. (C5). That as part of the conspiracy the defendant Dillon did vilify and attaint the plaintiff Saul Stambler by making findings of fact contrary to evidence and without evidence, (C11) and that pursuant to that attainder the plaintiff Rose Stambler and the corporate entities,

wholly owned by the Stamblers were to be deprived of the properties and the properties were granted to the co-defendants.

The motive for the conspiracy was the inability of County Dollar and Title Guarantee Co., to prove any title to the land appropriated by them. (C15)

Simply stated the facts are:

In 1960 Empire Park, Inc., (a dissolved corporation) owned a long strip of land in Yonkers, New York. (C15)

The corporation was dissolved by proclamation in 1938. (C16)

The president of the corporation died in 1955. (C16)

In 1960 County Dollar Corp., and its predecessor in title and part owner Cross Properties, Inc., with the aid of Title Guarantee Co., appropriated a portion of this strip, and included it between other lands it had purchased on both sides of the strip. (C15)

Wasylec also owned property on both sides of the strip. (C15)

In 1960 Wasylec contracted to sell two parcels of land that he owned as one contiguous parcel, and included part of the strip, to a group headed by Finke.(C15)

Wasylec did not disclose the existence of the

strip.

Finke, thru a survey, learned of the strip, did not disclose his knowledge and sought title insurance from two different title insurance companies.(C15)

The first title insurance company rejected title without learning about the strip. (C15) The second title insurance company, Title Guarantee took exception to the strip. (C15)

When all efforts to solve the title problem by Title Guarantee, Wasylec and Finke failed, Finke called upon this plaintiff, Saul Stambler, (C16) and agreed orally to purchase the needed portion of the strip if Stambler obtained and made marketable the title. No finding is made by the defendant Dillon as to the relationship between Stambler and Finke.

The decision gives the date of the meeting between Finke and Stambler as November 15, 1960, (C16) and states that Finke testified to referring Stambler to Wasylec's attorney, but makes no mention that Wasylec's attorney denied this.

The decision also states Stambler's version of what Finke said without mentioning that Stambler's statement refers to a conversation with Finke on December 7, 1960.

Neither version includes the term "disbursements" (C20) which indicates some agreement at variance with reported testimony.

The stock interests of Antoinette K. Gordon and of Sadye Schachner were purchased by the plaintiffs. (C17) and (C18)

Tender pursuant to the oral agreement was made to Finke, who repudiated his agreement, and refused to pay the disbursements pursuant to his agreement. (C20)

After title was perfected a portion of the strip was purchased by Wasylec, who immediately after the closing, instituted suit to recover the consideration without returning the land, afterward amending the suit to one for constructive trust. (C18)

Subsequently the plaintiffs thru (Prudential Operating Co., Inc.,) instituted a suit to rescind the sale because of Wasylec's fraud. (C19)

County Dollar and Title Guarantee Co., instituted suit against Empire Park Inc., (a new corporation) to bar claim even tho they had no title. (C19)

Wasylec and Title Guarantee moved before Justice Dillon to consolidate the actions, which Justice Dillon did. Justice Dillon thereafter tried the consolidated actions. (C15)

The decision of Justice Dillon was based on findings made by him on the subject matter of the transactions between Stambler and Antoinette K. Gordon, and Stambler and Sadye Schachner. (C21)

Justice Dillon heard testimony in reference to the transaction between Stambler and Antoinette K. Gordon from defendant George B. Gordon,[1] there was no testimony offered in reference to the transaction between Stambler and Sadye Schachner.

In reference to the transaction between Stambler and Antoinette K. Gordon, Justice Dillon heard the following admissions by defendant George B. Gordon:-

Gordon assumed he (Stambler) introduced himself as such and such an official of such and such company, when Stambler wrote on an official letterhead. (F 8-9)

He made no inquiries beyond the superficial indications. (F9)

He doesn't know if Stambler stated he was an official. (F9)

He doesn't remember the first telephone conversation. (F10)

He doesn't recall. (F10-11)

He doesn't recall. (F11)

He didn't ascertain who Mr. Stambler was, but assumed-- (F14)

He doesn't recall. (F 17-18)

---

1. The cross-examination of George B. Gordon is offered as a footnote to the petition and references are to F and page number.

He doesn't recall Stambler stating he had no connection with Wasylec. (F 24)

Gordon admits never hearing a blunt statement by Stambler that he represented Wasylec. (F 25)

He believes he asked Stambler whether he represented Wasylec in first conversation. (see statement on F 10)(F26)

He assumed documents were for Wasylec. (F26)

He thought Stambler assured him that he represented Wasylec in initial phone conversation. (see F 25, 26 and F 10) (F 36)

and thereafter Justice Dillon stated his findings that Stambler had misrepresented himself and that the letter-head was consistent with prior representations. (C 17)

In reference to the transaction between Stambler and Finke, Justice Dillon made this statement:

> "Even if Stambler's version and interpretation of the conversations had with Finke relating to the gore were accepted as true, the court could not approve of the manner in which title to the gore was acquired by Stambler. Whether Stambler formed the intent to acquire title to the gore for himself at the very incepttion of his introduction to the transaction, or whether he only formed such intent after Finke refused to pay him "disbursements" of $1,500., is not the controlling feature of this case. It is the court's opinion that once Stambler was advised that Finke would not pay him for his services, he was not at liberty to strike out on his own."(C 20)

In reference to the transaction between Stambler and Wasylec, Justice Dillon made these statement:

> "Wasylec agreed with Stambler to pay $15,000. for a conveyance of that portion of the gore which ran through the Wasylec property. A title closing was held on June 26, 1961, at which Prudential Operating Co., conveyed the necessary portion of the gore to Wasylec for $15,000." (C 18)
>
> "It cannot be said that any fiduciary relationship existed between the plaintiff and Stambler or any of the persons in the Stambler group. However, in the court's opinion the existence of a fiduciary relationship in and of itself is not the key question to be resolved in determining the liability, if any, of Stambler or the members of his group." (C 20)
>
> "Stambler and his associates will be permitted to retain the sum of $3,000. to defray expenses and to compensate Stambler for the fair and reasonable value of the services which he rendered." (C 23)

Appeals were taken to the Appellate Courts in New York State on constitutional grounds. Justice Dillon's decision was affirmed without opinion in the Appellate Division of the New York Supreme Court and the New York Court of Appeals dismissed the appeal on motion as it could not see any constitutional question. (B 3)

The plaintiffs in this law suit seek to show affirmatively the conspiracy between the state court justice and the codefendants to deprive them of their liberty and property using the office of the court to accomplish the purposes of the conspiracy and to deny

them their constitutional rights and due process of law.

In essence the complaint is that under color of state law the defendants conspired to deny the plaintiffs the equal protection of the law by applying to them the law relating to persons who violate a fiduciary duty while admitting that such a fiduciary duty did not exist.

That the defendant justice used his office to convert a vendor purchaser relationship into a master and servant relationship and to declare the vendor in service to the purchaser, all for the purpose of concealing or camouflaging the taking of property legally owned by Empire Park, Inc., and giving the title to such property to County Dollar and Title Guarantee Co.

This suit was instituted by the appellants filing the original complaint in the United States District Court for the Southern District of New York on February 8, 1968. Thereafter all the defendants were served and all defendants except the defendant Dillon answered the complaint. (B 4)

A. The defendants Wasylec, Avstreih and Weiss were proceeding to execute the judgment under attack in this suit by having the Sheriff of Westchester County, New York sell at auction the home of the petitioners. The petitioners moved by order to show cause to restrain this sale. This motion for a temporary injunction came on before the Hon. William B. Herlands, United States District Judge. Judge Herlands directed both sides to sub-

mit findings of fact and conclusions of law. Both sides conceded in the conclusions of law that a temporary injunction should issue. They disagreed as to the amount of the undertaking to be posted (B 8)

With the only issue before him, the amount of the undertaking to be posted, Judge Herlands admittedly went into the record and could not see any violation of civil rights or constitutional rights and denied the injunction. A notice of appeal was filed from the order denying the injunction. A motion was made in The Circuit Court of Appeals Second Circuit for a stay pending appeal. This motion was denied. The issues on that appeal became moot. (B 8)

B. The defendant Dillon, a justice of the Supreme Court of the State of New York sitting in Westchester County, moved to dismiss the complaint pursuant to Rule 12 (b) 1, 2 and 6 R.F.C.P.

This motion came on before Hon. John F. X. McGohey on April 30, 1968. The decision on this motion was filed with the Clerk of the District Court on July 13, 1968. (B 1)

Judge McGohey ruled that the District Court had jurisdiction of the action under 28 U.S.C. 1343.(B 4) and that the doctrine of judicial immunity did not apply. (B 4) He granted the motion to dismiss the complaint as the overt acts were not specifically alleged. (B 4)

The petitioners sought to examine the defendant Dillon and the defendant Title Guarantee Co. The District Court (Judge Bonsal) granted a protective order to Justice Dillon and Judge Tenney denied petitioner the opportunity to examine the defendant Title Guarantee Co.

The other defendants made motions for judgment on the pleadings and the petitioners moved to amend the judgment as to the defendant Dillon, and for leave to amend the complaint as to all defendants.

These motions came on for argument before the Hon. Charles Tenney, United States District Judge on August 13, 1968. By memorandum filed October 7, 1968 Judge Tenney denied the motions for judgment on the pleadings and granted petitioners permission to serve and file an amended complaint. (B 8)

In the original complaint, the petitioners used the terms "convicted" and "involuntary servitude" to describe the acts of defendant Dillon. These terms were ruled by Judge McGohey to be frivolous. (B 4)

The petitioners, therefore, moved for an order to examine the defendant Dillon, so that they could properly frame the amended complaint. (B 9)

This motion came on before the Hon. Inzer B. Wyatt, United States District Judge, on October 31, 1968. (B 17)

In his ruling Judge Wyatt said:

> "There is no authority under the Federal Rules of Civil Procedure for any such deposition."
>
> "Even if such a deposition were authorized, it is clear that it ought not to be permitted here."

Judge Wyatt ended his order with the following paragraph:-

> "The explanation made above establishes that such motions as the present are harassment to all those concerned. The plaintiffs are taking the time of judges of this Court to deal with essentially frivolous matters to the prejudice of other litigants in this Court. Plaintiffs are strongly advised to desist in such conduct. Continuance can only lead to the imposition of sanctions or the entry of an injunction against plaintiffs or both."

This paragraph has been described by some of the defendants as an "admonition", by Judge Herlands as a "comment" (B 9) and by the petitioners as a clear threat.

On November 29, 1968 the petitioners served and filed the amended complaint. All the defendants answered except the defendant Dillon, who again moved to dismiss the complaint.

The defendant Dillon filed his motion December 13, 1968 returnable January 14, 1969.

The other defendants, thereafter, moved for judgment on the pleadings all motions returnable on January 14th.

The motion by O'Malley, County Dollar and Title Guarantee was filed December 16, 1968 returnable January 14, 1969. The motion by Wasylee, Weiss and Avstreih was filed December 24, 1968 returnable January 14, 1969. The motion by Finke was filed December 24, 1968 returnable January 14, 1969. The motion by Gordon was filed January 2, 1969 returnable by January 14, 1969.

On January 14th, 1969, the Hon. William B. Herlands, United States District Judge was presiding in motion part. (B 5)

The petitioners, faced with five motions and prosecuting their claim pro se, made an application for an adequate adjournment to permit proper and complete briefing of the points raised by those motions. This application was denied.(B 8)

Petitioners served Judge Herlands with an affidavit of bias and prejudice. (B 8)

Five months later on June 23, 1969 the opinion and judgment of Judge Herlands was filed. (B 5)

The application for disqualification was denied in a footnote. (B 8)

Using the premise that the defendant Dillon was immune, (B 9) Judge Herlands ruled that the complaint failed to state a claim because the immunity prevented any proof of state action. (B 10)

Judge Herlands could not see any allegations in the complaint to support a claim under any of the sections of the Civil Rights Act under which the action was brought.

The petitioners had filed no briefs or affidavits in opposition to the motions before Judge Herlands nor were they given any opportunity to do so. (B 8)

Judge Herlands stated in his decision that he considered only the pleadings and that these petitioners were therefore not prejudiced by his refusal of an adjournment. (B 8)

On July 1st, 1969 the petitioners served and filed a motion pursuant to Rules 59 (e) and 15 (a) F.R.C.P. to amend the judgment and for leave to serve and file a second amended complaint. This motion was noticed for August 5, 1969. A memorandum of law and a proposed second amended complaint were served and filed the the proposed complaint was not entered on the docket. (B 13)

On August 5, 1969 at the request of the defendants and over the objection of the petitioners this motion was referred to Judge Herlands. Judge Herlands was not in the Courthouse. Judge Herlands passed away August 28, 1969. (B 13)

By order filed October 14, 1969, Sugarman, Ch. J.,

assigned the action to Wyatt, J. The docket reads "notice sent". No notice was received. (B 13)

On October 24, 1969, Judge Wyatt rendered his opinion (B 13) denying the motion to amend and made the following order:-

> The plaintiffs are ordered and directed to make no further motions or applications to this Court in this matter and to file no further papers in this Court except such as may be necessary or appropriate in connection with any appeals taken to the Court of Appeals. (B 18)

On November 7th, the petitioners filed an affidavit of bias and prejudice against the Hon. Inzer B. Wyatt, United District Judge.

On November 12th, Judge Wyatt held the affidavit to be insufficient.

On November 18th, 1969 the petitioner moved to reargue or for affirmative answers to the following questions:

1. The section of the law granting authority to a United States District Judge to deny a litigant the constitutional right to proceed in this Court pursuant to the Federal Rules of Civil Procedure.

2. The law on which the judge based the denial of motion.

3. The good reason on which the judge based his exercise of discretion as mandated by the United States

Supreme Court in Roman v Davis 371 U.S. 178.

On December 1st, 1969 this motion was denied. The questions were not answered.

On November 7th, 1969 the petitioners filed a notice of appeal from both the judgment by Judge Herlands and the order of Judge Wyatt.

On December 9th, 1969 the petitioners filed an amended notice of appeal from the judgment and both orders.

Petitioner was foreclosed in the motion part from proceeding to trial on the first complaint (appendix B) which ruled that the District Court had jurisdiction of the action pursuant to 28 U.S.C. 1343 and that the doctrine of judicial immunity did not apply in actions for declaratory and injunctive relief. The complaint was dismissed as the overt acts were not specifically described.

Petitioner was foreclosed in motion part from proceeding to trial on the amended complaint when the District Court ruled that the doctrine of judicial immunity did apply and that such immunity prevented proof of state action against the codefendants. No answer was made by the defendant justice nor was any affidavit submitted by the defendant justice in support of a 12(b) motion to dismiss the complaint. Judge Herlands stated that on this motion he was only considering the pleadings, as the petitioners had not submitted any affidavits in opposition and had requested an adjournment

which request was denied. The petitioner served Judge Herlands with an affidavit of bias and prejudice.

Petitioners were denied the opportunity to replead to show state action against the other defendants whether or not the state court justice remained as a party defendant.

The Court below affirmed, without opinion.

REASONS FOR GRANTING THE WRIT

I. There is no tribunal to redress wrongs committed by judges. Even judges recognise this lack and the following quotation is appropriate.

> Probably we all remember that Canon One of the Canons of Professional Ethics admonishes lawyers to:
>
> . . . maintain towards the courts a respectful attitude, not for the sake of the temporary incumbent of the judicial office, but for the maintenance of its supreme importance.
>
> The Canon goes on to say that because judges are not fully free to defend themselves, they are entitled to receive the support of the bar against unjust criticism and clamor. But how many can remember the last two sentences of that canon? I find that most lawyers in this state have never heard of them.
>
> The Canon adds this:
>
> Whenever there is proper ground for serious complaint of a judicial officer it is the right and duty of the lawyer to submit his grievances to the *proper authorities*. In such cases, but not otherwise, such charges should be encouraged and the person making them should be protected.
>
> Would someone please tell me what is the proper authority to which a lawyer may submit his grievances in the state of Washington? I asked members of the Board of Governors of the State Bar Association and received guesses like the state Supreme Court chief justice, the state court administrator, or the assignment judge of the court to which that judge belonged. Another thought it was a bar association responsibility but did not specify state or local.
>
> They are all incorrect. There is no proper authority in this state.

This excerpt from an article by the Hon. Eugene A. Wright, Judge of the United States Court of Appeals, 9 Circuit in Judicature Vol. 53 Number 4, November 1969, entitled

"What is Proper Authority under Canon 1", applies in most states of the Union.

The misconduct of the few judges which goes unpunished undermines the respect for the many fine men who conscientiously seek to adjudicate the problems of our complex society.

Where a wrong has been committed by an official or judge, who used the power vested in him by his office to vent his spleen or to misuse that power because of other considerations, not in the public good, there must be available some means of redress, or some means to expose that misconduct. This action is directed toward the exposure of such acts.

As Chief Judge Learned Hand said in Gregoire v Biddle 177 F. 2nd 579, 581

> It does indeed go without saying that an official, who is in fact guilty of using his powers to vent his spleen upon others, or for any other personal motive not connected with the public good, should not escape liability for the injuries he may so cause; and, if it were possible in practice to confine such complaints to the guilty, it would be monstrous to deny recovery.

> There must indeed be means of punishing public officers who have been truant to their duties; but that is quite another matter from exposing such as have been honestly mistaken to suit by anyone who has suffered from their errors.

All the decisions in actions against judges for damages cite Bradley v Fisher 80 U.S. 335 as the basic law on the doctrine of judicial immunity from liability for civil damages. In that basic decision this Court specifically excepted from this doctrine acts by a judge who lacked subject matter jurisdiction and knew of that lack of jurisdiction.

In decision after decision, where courts grant immunity to a state court judge, this exception is cited as the only basis for liability.

In this action the petitioners quote the admission by the state court judge that the victims of an alleged fraud make no such complaint, and brought no action to invoke the jurisdiction of his Court.

In view of the statement by this Court in Bradley v Fisher supra that where the "lack of jurisdiction is known to the judge any authority exercised is a usurped authority", it was clearly error to describe the acts of the defendant state court judge as being "in the course and scope of his judicial duties".

II. This is an action for declaratory and injunctive relief against all the defendants.

The petitioners seek by this action to expose the misconduct and conspiracy of the defendants and particularly the defendant state court judge.

No claim of civil liability is made against the state court judge. The action can be considered as an action <u>in rem</u> to determine the validity of the acts of this defendant. If as these petitioners contend he acted without subject matter jurisdiction his acts would be void as he did what he had no right to do.

Any claim of judicial immunity does not apply in this case. A similar claim to immunity in an action for injunctive relief was made in U.S. v Clark 249 F.Supp. 720, 727. The court's discussion of the subject of judicial immunity in such actions is very appropriate to this case:-

> [4-6] The argument is advanced on behalf of the defendants Judge Hare, Solicitor McLeod, and Judge Reynolds, that they, as judicial officers, may not be enjoined; this argument is based upon the theory that they are immune from suit on matters growing out of their judicial acts, notwithstanding the fact that their conduct may have exceeded their jurisdiction. This doctrine of "judicial

immunity" is a sound one and ingrained in the substantive law of both the Federal and State courts. Norton, et al. v. McShane (5th Cir. 1964), 332 F.2d 855, and the several cases cited therein; Zellner v. George Wallace, MD Ala.1964, 233 F. Supp. 874. The Federal courts have applied it to numerous Federal officials.[10] *However, such a doctrine of judicial immunity applies only when those officials are faced with civil suits for damages in connection with the performance of their official duties.* The doctrine has no application where, as here, the relief sought is preventive. In this connection, it is well established that the United States, suing under a Federal statute conferring mandatory jurisdiction on a Federal court, is entitled--if the evidence warrants it--to injunctive relief against State and local officials. United States v. Wood, 295 F.2d 772, (5th Cir. 1961), cert. denied 369 U.S. 850, 82 S.Ct. 933, 8 L.Ed.2d 9. This includes sheriffs, prosecutors and all others, whether they be judges or governors, who may participate in a scheme or engage in a pattern of conduct designed to deprive citizens of their constitutional rights. The principle that no State official--regardless of his position--is immune from having his conduct challenged—in the form of a preventive action--is well established. Cooper v. Aaron, 358 U.S. 1, 78 S.Ct. 1401, 3 L.Ed.2d 5; Lucas v. Forty-Fourth General Assembly of State of Colorado, 377 U.S. 713, 84 S.Ct. 1459, 12 L.Ed.2d 632; Sterling v. Constantin,

287 U.S. 378, 53 S.Ct. 190, 77 L.Ed. 375; Bush v. Orleans Parish School Board (E.D.La., 1960), 187 F.Supp. 42, aff'd 365 U.S. 569, 81 S.Ct. 754, 5 L.Ed.2d 806; In re Wallace (M.D.Ala., 1959), 170 F.Supp. 63.

[7] Since 42 U.S.C. § 1971 and Title II of the 1964 Act confer mandatory jurisdiction upon this Court and there is no immunity from a preventative relief suit such as this one, the assertions on behalf of the defendants, Judge Hare, Solicitor McLeod, Sheriff Clark and Judge Reynolds, are without merit. Such an action involves no interference with judicial discretion since an injunction—if warranted by the evidence and if issued—will only prevent the doing of what there is no right to do. Ex parte Young, 209 U.S. 123, 159, 28 S.Ct. 441, 52 L.Ed. 714.

III. Initially this is an attempt by the petitioners to use the courts to redress a wrong done by a public officer - a state court justice. As against that official there is no claim made of <u>civil liability</u> for <u>money damages</u>.

The petitioners are seeking a declaration that misconduct by a state court justice renders his acts null and void.

The petitioners were denied the basic safeguard of the due process clause of the Fifth and Fourteenth Amendments.

In St. Joseph Stockyards Co., v United States 298 U.S. 38, Mr. Justice Brandeis in his concurring opinion said:-

> "The inexorable safeguard which the due process clause assures is not that a Court may examine whether the findings are correct, but that the trier of the facts shall be an impartial tribunal, that no finding shall be made except upon due notice on opportunity to be heard; that the procedure at the hearing shall be consistent with the essentials of a fair trial;"

The wrongs committed by this judicial officer were multiple and motivated by his desire to distract attention from his act of taking property lawfully owned by Empire Park, Inc., and granting title to that property to County Dollar and Title Guarantee.

A. To distract attention from his own acts, this officer vilified the first named plaintiff by making findings contrary to evidence.

a-1) He heard testimony by the defendant Gordon that Gordon assumed a representation that this plaintiff represented a title company and based that assumption on a letter-head from an abstract company, he also heard the defendant Gordon state that there was no representation made that this petitioner represented the defendant Wasylec - despite this evidence the defendant justice made a finding that this plaintiff did make such representations, and that the use of the letter-head was consistent with prior representations.

a-2) The defendant justice heard testimony by the defendant Finke that Finke had referred the plaintiff Saul Stambler to John J. McQuade, a former attorney for defendant Wasylec, he also heard this testimony denied by both this petitioner and by John J. McQuade and thereafter reported the testimony of the defendant Finke without disclosing the denial made by John J. McQuade.

a-3) The defendant justice heard testimony from the defendant Gordon that Gordon and two other persons as administrators of the estate of Milton J. Gordon, deceased, gave a deed to the defendant Wasylec, and the defendant justice also saw the affidavit of Sadye Schachner which stated that Milton J. Gordon never owned any stock in

Empire Park, Inc., (the dissolved corporation) and thereafter made a finding that Wasylec received "a deed from the survivors of the sole owner of all except the organizational stock of that corporation".

B. The defendant justice quoted facts out of context to create an impression of evil intent:-

b-1) He quotes the defendant Finke as stating that Finke referred Stambler to McQuade, and quotes Stambler as stating that Finke said that Stambler should acquire the property, perfect title and thereafter offer the property to either Finke or Wasylec, but the justice doesn't disclose the fact that Stambler's testimony refers to a conversation that took place three weeks after the date of Finke's alleged statement and after Stambler had acquired the property and had expended both money and work according to an agreement between Stambler and Finke, which Finke repudiated.

b-2) Justice Dillon states, "However, the proof is clear that Stambler did not approach Wasylec until after he had acquired title to the gore." Justice Dillon does not mention the specific agreement that required Stambler to deliver title to Finke and only to Finke. Any implication that any party other than Finke had any right to ask delivery of title without paying a consideration was wholly a judge made implication in fact, and was one of the overt acts in the conspiracy.

C. He quoted descriptions of fraudulent activities by a fiduciary or confidant from decisions in cases involving a fiduciary or confidential relationship knowing and admitting such relationship did not exist between the plaintiffs and any of the defendants.

D. Using all the foregoing to make findings of wrongful acts and wrongdoing and then using these findings as the basis to grant judgment against the plaintiffs and the corporate parties on whose behalf they are now seeking relief, though admitting that none of the wrongful acts were committed against any of the defendants and that the alleged victims of the wrongdoing make no claim of fraud and misrepresentation and instituted no action to invoke the jurisdiction of his court.

This is not an attempt to retaliate for an unfavorable decision honestly arrived at thru honest mistake, but is an attempt to expose acts by an officer who admitted that he lacked jurisdiction over the subject matter but was using his findings to aid his codefendants.

While "public policy requires that persons occupying such important positions should speak and act freely and fearlessly in the discharge of their important official functions", this same policy requires that such persons act honestly.

This is not a case of mistake or error. The defendant justice made findings directly contrary to testimony he heard, accepted thoughts, assumptions and inuendoes as proven fact and admitted his lack of jurisdiction over subject matter on which he based his decision.

This Court specifically excepted from the doctrine of judicial immunity the acts of the defendant justice when it stated in Bradley v Fisher 80 U.S. 335, 351

> " Where there is clearly no jurisdiction over the subject-matter any authority exercised is a usurped authority, and for the exercise of such authority, when the want of jurisdiction is known to the judge, no excuse is permissible."

It therefore follows that a definition or understanding of jurisdiction is the determining factor in granting or denying immunity in a suit for civil damages against a judicial officer.

The New York State Court of Appeals in Murray v Brancato, 290 N.Y. 52,55, describes this requirement in the following words:-

> The rule or principle of exemption has been stated in many opinions and in varying forms, but " It is to be seen that in these different modes of stating the principle, there abides a qualification. To be free from liability for the act, it must have

> been done as judge, in his judicial capacity; *it must have been a judicial act.* So it always remains to be determined, when is an act done as judge, in a judicial capacity? And this is the difficulty which has most often been found in the use of this rule, and which is present here; to determine when the facts exist which call into play that qualification. For it is plain that the fact that a man sits in the seat of justice, though having a clear right to sit there, will not protect him in every act which he may choose or chance to do there." (*Lange* v. *Benedict*, 73 N. Y. 12, 23, 26.)

The "normal duties" of judicial office require the judge to decide the issues between parties who invoke the jurisdiction of his Court.

Reynolds vs. Stockton (140 U.S. 265) defines and illustrates jurisdiction as follows:

> Jurisdiction may be defined to be the right to adjudicate concerning the subject-matter in the given case. To constitute this there are three essentials: First, the court must have cognizance of the class of cases to which the one to be adjudged belongs; second, the proper parties must be present; and third, the point decided must be, in substance and effect, within the issue. That a court cannot go out of its appointed sphere, and that its action is void with respect to persons who are strangers to its proceedings, are propositions established by a multitude of authorities. A defect in a judgment arising from the fact that the matter decided was not embraced within the issue has not, it would seem, received much judicial consideration. And yet I cannot doubt that, upon general principles, such a defect must avoid a judgment. It is impossible to concede that because A and B are parties to a suit, a court can decide any matter in which they are interested, whether such matter be involved in the pending litigation or not. Persons by becoming suitors do not place themselves for all purposes under the control of the court, and it is only over

these particular interests, which they choose to draw in question, that a power of judicial decision arises." And again: "A judgment upon a matter outside of the issue must, of necessity, be altogether arbitrary and unjust, as it concludes a point upon which the parties have not been heard. And it is upon this very ground that the parties have been heard, or have had the opportunity of a hearing, that the law gives so conclusive an effect to matters adjudicated.

In Standard Oil Co. vs Missouri et. (224 U.S. 270, 282) This Court stated the same proposition in this manner.

> Under the Fourteenth Amendment they were entitled to notice and an opportunity to be heard. That necessarily required that the notice and the hearing should correspond, and that the relief granted should be appropriate to that which had been heard and determined on such notice. For even if a court has original general jurisdiction, criminal and civil, at law and in equity, it cannot enter a judgment which is beyond the claim asserted, or which, in its essential character, is not responsive to the cause of action on which the proceeding was based.
>
> "Though the court may possess jurisdiction of a cause, of the subject-matter, and of the parties, it is still limited in its modes of procedure, and in the extent and character of its judgments. It must act judicially in all things, and cannot then transcend the power conferred by the law. If, for instance, the action be upon a money demand, the court, notwithstanding its complete jurisdiction over the subject and parties, has no power to pass judgment of imprisonment in the penitentiary upon the defendant. If the action be for a libel or personal tort, the court cannot order in the case a specific performance of a contract. If the action be for the possession of real property, the court is powerless to admit in the case the probate of a will. . . . The judgments mentioned, given in the cases supposed, would not be merely erroneous: they would be absolutely void; because the court in rendering them would transcend the limits of its authority in those cases." *Windsor* v. *McVeigh*, 93 U. S. 274, 282. See also *Reynolds* v. *Stockton*, 140 U. S. 254, 285-288. *Barnes* v. *Railway*, 122 U. S. 1, 14.

Based on the foregoing rulings it follows that the following statement by the defendant Dillon

> "While it is true that the persons who assigned the stock in Empire Park, Inc., and who executed affidavits to effectuate a conveyance of the gore have not instituted the present action, the court is of the opinion that the doctrine enunciated in the above cited cases should be utilized to protect the interests of those persons who actually sustained damages because of Stambler's wrongful acts".
> (Emphasis added)

is an admission that he was acting on subject matters where his jurisdiction had not been invoked and was ministering to his own personal prejudices or arrangements.

It should be noted that damages the defendant Dillon mentions were:-

1. The frustration of attempted frauds by both defendants Wasylee and Finke.

2. The exposure of land stealing by defendants County Dollar and Title Guarantee.

IV. The District Court should not have dismissed the complaint without any affidavit from the defendant state court justice or denied the plaintiff the right to an answer to the complaint by that defendant.

The complaint alleged a conspiracy by all the defendants to deprive the plaintiffs of their liberty and property and to deny them the equal protection of the law and due process of law. The complaint also alleges that

the defendant state court justice made findings contrary to the evidence knowing them to be contrary and appended to the complaint as an exhibit is the decision of that defendant.

The dismissal of the complaint, as to the other defendants by the District Court on the ground that the immunity granted to the defendant state court justice prevented proof of state action, is clearly erroneous and is contrary to the ruling by this Court in Adickes v Kress 90 S Ct. 1598, 1605 where the Court said:-

> [9, 10] The involvement of a state official in such a conspiracy plainly provides the state action essential to show a direct violation of petitioner's Fourteenth Amendment equal protection rights, whether or not the actions of the police were officially authorized, or lawful; Monroe v. Pape, *supra*; see United States v. Classic, 313 U.S. 299, 326, 61 S.Ct. 1031, 1043, 85 L.Ed. 1368 (1941); Screws v. United States, 325 U.S. 91, 107–111, 65 S.Ct. 1031, 1038–1040, 89 L.Ed. 1495 (1945); Williams v. United States, 341 U.S. 97, 99–100, 71 S.Ct. 576, 578–579, 95 L.Ed. 774 (1951). Moreover, a private party involved in such a conspiracy, even though not an official of the State, can be liable under § 1983. "Private persons, jointly engaged with state officials in the prohibited action, are acting 'under color' of law for purposes of the statute. To act 'under color' of law does not require that the accused be an officer of the State. It is enough that he is a willful participant in joint activity with the State or its agents," United States v. Price, 383 U.S., at 789, 86 S.Ct., at 1157.'

Mr. Justice Black concurring in Adickes v. Kress, supra stated the rule as to summary judgment in federal court, even more applicable to 12(b) motions to dismiss:

> "Summary judgments may be granted only when 'the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact...' The existence or nonexistence of a conspiracy is essentially a factual issue which the jury, not the trial judge should decide.' "

V. The act of the defendant Justice Dillon was either the legislating of a bill of Attainder or a deprivation of liberty and property without Due Process of Law.

This defendant admitted that no action had been instituted by persons who sold property to the plaintiffs, it therefore follows that "any authority exercised was a usurped authority" Bradley v Fisher supra, and he was not acting in the "course)and scope of his judicial duties" and had no right to exercise the "normal duties of his office".

In an article in the California Law-Review (Vol. 54: 212, 214, the following description of the characteristics of a Bill of Attainder are stated:-

"A typical bill of attainder had four essential characteristics: (1) It identified the victim by name, (2) it recited his actions which Parliament felt deserved punishment; (3) it contained a declaration of guilt; and (4) it prescribed the punishment.

If in the above description the term "Judge" is substituted for "Parliament" the nature of Justice Dillon's decision is perfectly clear.

Since his jurisdiction was not invoked it cannot be said that Justice Dillon acted as a "Judge".

The District Court (Herlands, J.) ruled that the doctrine of judicial immunity prevents the proof of state action against codefendants not officials of the state in an action under 42 U.S.C. 1983. This Court's ruling in Adickes v S.H. Kress & Company, supra clearly shows the District Court's ruling to be erroneous.

Whether or not Justice Dillon was named as a defendant can not be the criteria in determining state action. If the judicial function of the state was used to accomplish the purposes of the conspiracy, that in and of itself supplies the state action, as that use was the only means of accomplishing the purposes of the conspiracy.

This Court said:

> "The short of the matter is that from the time of the adoption of the Fourteenth Amendment until the present, it has been the consistent ruling of this Court that the action of States to which the Amendment has reference includes state courts and state judicial officials"
>
> Shelly v Kraemer
> 334 U.S. 1, 18

VI. The abuse of discretion by the District Court and the affirmance by the Court of Appeals cry out for action by this Court.

a) The first District Court Judge rules that the doctrine of immunity does not apply in an action for declaratory and injunctive relief.

The second District Court Judge says it does.

A third District Court Judge says that even if the rules permit, no depositions should be permitted in this case, and thereafter refuses the plaintiffs the opportunity to replead.

b) The complaint alleges that the defendant state court justice acted when he knew his jurisdiction had not been invoked.

The first District Court Judge calls the acts of the defendant state court justice the "normal duties of his office".

The second District Court Judge describes the defendant justice's acts as in "the course and scope of

his judicial duties".

When the defendant state court justice made a judicial finding of "wrongdoing - fraud misrepresentation - wrongful acts" the second District Court Judge alters this to a mere "remark".

The abuse of the term "frivolous" without any frame of reference flies directly in the face of the mandate in Adickes v S.H. Kress, supra.

The plaintiffs seek a trial on the merits. The plaintiffs claim that their complaint states a cause of action and a claim on which relief can be granted.

The judges in the lower courts seem intent on protecting from exposure the conduct of a colleague, no matter how illegal and how wrongful such conduct may be.

VII. Initially it should be noted, that in this action pursuant to the civil rights laws and the Thirteenth and Fourteenth Amendments, the only claim as against the state court justice is for declaratory and injunctive relief.

As this Court in the concurring opinion by Mr. Justice Stone in Hague v Committee 307 U.S. 496, 519, stated:-

> "the right to maintain a suit in equity to restrain state officers, acting under a state law, from infringing the rights - - - -guaranteed by the due process clause, is given by act of Congress to every person within the jurisdiction of the United States whether a citizen or not and such suit may be maintained in the district court without allegation or proof that the jurisdictional amount required by § 24(1) of the Judicial Code is involved."

The District Court clearly misapplied the doctrine of judicial immunity in this law suit.

VIII. The approval by the Court below of the District Court's dismissal of the complaint makes a travesty of the plain meaning Civil Rights laws and the Thirteenth and Fourteenth Amendments where the complaint clearly alleges that the defendant state court justice usurped authority over subject matter where the jurisdiction of his Court had not been invoked and admitted his lack of jurisdiction.

This clearly brought his actions into the exception to the doctrine of judicial immunity by the ruling in Bradley v Fisher 80 U.S. 335, supra.

It appears that the narrow exception to the doctrine which limited liability to acts of judges who had "no jurisdiction and knew they lacked jurisdiction" is now to be closed and judges to be above the law.

The approval by the Court below, of the dismissal of the complaint in the motion part of the District Court, violates the plain meaning of 42 U.S.C.§ 1983, where the complaint clearly alleged the overt acts of the defendants in converting a vendor-purchaser relationship at arms length into a master and servant relationship while admitting the non-existence of a fiduciary duty and thereupon imposing a duty on the plaintiffs after the fact. If this were done by legislative act there would be no question that such act would be barred by the Ex Post Facto Clause (Art 1 Sec. 10) it must follow that a State Supreme Court is barred by the Due Process Clause from achieving precisely the same result by judicial construction. Bouie v City of Columbia 378 U.S. 347, 353.

Constructive trust, which is an equitable remedy to prevent unjust enrichment by a fiduciary or confidant and is limited to such preexisting relationships, if applied where such relationships do not exist would create an involuntary servitude prohibited by the Thirteenth Amendment or a deprivation of liberty prohibited by the Fourteenth Amendment.

The enlargement of the application of this remedy by a state court to persons dealing at arms length, over-ruling a consistent line of decisions limiting this remedy to persons in a fiduciary capacity with the

retroactive effect of denying a litigant notice of liability thereby deprives him of due process of law "in its primary sense of an opportunity to be heard and to defend his substantive right" Brinkerhoff-Faris Trust and Savings Co. v Hill 281 U.S. 673, 678.

When as in this case the unforeseeable state court enlargement of the application of this remedy of constructive trust to persons dealing at arms length is applied retroactively to subject a person to quasi criminal liability for past conduct, the effect is to deprive him of due process of law in the sense of fair warning that his contemplated conduct could be deemed wrongful. Bouie v City of Columia supra.

> Applicable to either situation is this Court's statement in *Brinkerhoff-Faris, supra*, that "if the result above stated were attained by an exercise of the State's legislative power, the transgression of the due process clause of the Fourteenth Amendment would be obvious," and "The violation is none the less clear when that result is accomplished by the state judiciary in the course of construing an otherwise valid . . . state statute." *Id.*, at 679-680.

This Court has been moving toward the implementation of civil rights legislation, passed shortly after

'adoption of the Fourteenth Amendment, particularly in the area of property law which should certainly be extended to other rights as did Congress in the Civil Rights Act of 1964, Reitman v Mulkey,387 U.S. 369 (1967), Jones v. Alfred Mayer,392 U.S. 409 (1968), Hunter v. Erickson, ____U.S._____, (Jan. 20, 1969).

The history of our country shows that in the past white men as well as negroes have been held in servitude. The struggle for equal protection of law applies to white men as well as black men. If a white man can be denied the equal protection of the law, then it undermines the very basis upon which to determine the rights of black men.

IX. The defendant Dillon used his power as a state court justice to restrict the liberty of the petitioner and to create an involuntary servitude.

There is no question that Finke conferred with the petitioner Stambler about solving a problem affecting the title to a piece of land.

There is no question that Stambler solved that problem.

The circumstances under which Stambler called on Finke to pay him "disbursement" of $1,500.00 are not revealed by the defendant Dillon.

The defendant Dillon does not disclose the relationship between Stambler and Finke.

He merely rules "It is the Court's opinion that once Stambler was advised that Finke would not pay for his services, he was not at liberty to strike out on his own".

WAS STAMBLER A SLAVE?

There is no question that there was no agreement between Wasylec and Stambler to solve a problem.

There is no question that Wasylec purchased a piece of land from Prudential Operating Co., Inc.

There is no question that to solve the problem Rose Stambler purchased the interests of Antoinette K. Gordon and Sadye Schachner in Empire Park, Inc., (a defunct corporation) with her own funds.

Had all this not taken place and had Dillon made an order directing Stambler to use his knowledge and efforts and Rose Stambler her funds to purchase this land, clear the title and do so under terms and conditions made by Dillon under his state power, there would be no question that such act by Dillon would not only be illegal, but would also make Dillon subject to penal action by the United States for violation of the Thirteenth Amendment to the United States Constitution.

It is therefore clear that what Dillon could not do directly he could not do indirectly.

In Bailey v Alabama 291 U.S. 219

The Supreme Court said:-

> "What the state may not do directly it may not do indirectly."
>
> "The act of Congress deprives of effect all legislative measures of any state through which, directly or indirectly, the prohibited thing, to wit, compulsory service,....., may be established or maintained."
>
> "The state may impose involuntary servitude as punishment for crime, but it may not compel one man to labor for another."

It therefore follows that Dillon could not appropriate the efforts of Stambler and decree them as service for Wasylec nor could he take property purchased by Mrs. Stambler with her own funds and decree that property to be Wasylec's and County Dollar's.

It is obvious that it was the clear intention of Dillon to create an involuntary servitude.

When we compare the statements in his so-called decision with the badges and incidents of slavery described in the decision of the United States Supreme Court in Jones v Mayer & Co., (392 U.S. 409), Dillon's acts and intentions become apparent:-

> "Its 'burdens and disabilities'....included restraints upon "those fundamental rights which are the essence of civil freedom, namely, the same right ---- to inherit, purchase, lease, sell and convey property".
>
> "Slaves were not considered men. . .They could own nothing; they could make no contracts; they could hold no property, nor traffic in property; they could not hire out;. . . .they could not appeal from their master; they could be punished at will."
>
> Jones v Mayer
> 392 U.S. 409

X. By an order made October 7, 1968 Judge Tierney amended Judge McGohey's earlier order and granted permission to serve and file an amended complaint.

On November 29, 1968, petitioners filed and served an amended complaint. The Federal Rules require the answer to be served within ten (10) days.

The defendant Dillon went "shopping" for a judge more favorably disposed" and passed over two other judges to reach such a favorably disposed judge, Judge Herlands who was sitting in motion part on January 14, 1969.

As a favorably disposed judge, Judge Herlands could find no basis to dismiss the complaint if the defendant Dillon could not hide behind a cloak of judicial immunity.

For this reason Judge Herlands reversed the ruling of Judge McGohey that defendant Dillon, in this action, had no immunity.

The only issues for Judge Herlands to consider were the ones that Judge McGohey said remained to be determined:-

> "There remains to be considered the claimed conspiratorial deprivation of the plaintiffs' rights by Justice Dillon. Whether such a claim may be laid under sections 1983 and 1985 of Title 42 need not be decided here for in any event the complaint fails to allege sufficient facts to show that Justice Dillon was part of any such conspiracy if one existed. This is not enough."

and whether the amended complaint alleged sufficient facts to sustain the allegation of a conspiratorial deprivation of rights pursuant to 42 U.S.C. 1983 and 1985.

Were Judge Herlands to examine the complaint as to the sufficiency of the allegations he would have to sustain the complaint. For this reason he chose to disregard the doctrine of the law of the case and resort to the misuse of the doctrine of judicial immunity while recognizing that the relief sought against the defendant Dillon was declaratory and injunctive "and that the complaint alleged that the defendant Dillon acted where he lacked subject matter jurisdiction".

Petitioners ask that the doctrine of "law of the case" be applied.

In examining this doctrine in Dictograph Products Company Inc. v Sonotone Corporation 230 Fed. 2nd, 131, the Court stated as one of the reasons why a second judge should not reverse the first judge's ruling "if he does not do so defer, the defeated party may shop about in the hope of finding a judge more favorably disposed. ....The second reason has indeed much to recommend it, and, as a matter of practice has been universally regarded a sufficient reason for treating the first ruling as conclusive. The full quotation is:-

> No one will suggest that the first judge himself may not change his mind and overrule his own order, so that the basis of the doctrine can only be that there are reasons why the second judge may not do so that do not exist when the first does. We can think of only two such reasons: (1) the second judge should defer to the rule of the first as a matter of mutual respect between members of the same court; (2) if he does not so defer, the defeated party may shop about in the hope of finding a judge more favorably disposed. The first reason is clearly untenable; judicial sensibilities should play no part in the disposition of suitors' rights. The second reason has indeed much to recommend it, and, as a matter of practice, has been universally regarded a sufficient reason for treating the first ruling as conclusive.

There is no doubt that many judges find it repugnant to the integrity of the judiciary that there are men sitting on the Bench who should not be there. When, as in this action, it is shown that a judge violated the Canons of Judicial Ethics as well as the rules of pro-

cedure so blatantly, many judges, in their own interest and self-preservation, seek to protect their colleagues.

Judge Herlands, evidently, sought to protect his own standing by protecting defendant Dillon and contrary to the policy of the Courts overruled and reversed the "law of the case" by considering matters already decided.

In the Dictograph case (supra) it was ruled:-

> "That this is the only proper use of the doctrine appears from Messinger v. Anderson, 225 U.S. 436, 441, 32 S.Ct. 739, 740, 56 L.Ed. 1152, where the Supreme Court, through Holmes, J., spoke as follows: "In the absence of statute the phrase, 'law of the case,' as applied to the effect of previous orders on the later action of the court rendering them in the same case, merely expresses the practice of courts generally to refuse to reopen what has been decided, not a limit on their power." This was in substance repeated in United States v. United States Smelting, Refining & Min. Co., 339 U.S. 186, 198, 70 S.Ct. 537, 544, 94 L.Ed. 750: "The rule of the law of the case is a rule of practice, based upon sound policy that when an issue is once litigated and decided, that should be an end of the matter."

CONCLUSION

This Court should grant the petition for Certiorari and direct a trial on the merits.

Respectfully submitted,

SAUL STAMBLER
Petitioner Pro Se

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. 1148

[redacted] and [redacted] individually and [redacted] on behalf of [redacted] CORPORATION CO., INC., and [redacted] PARK INC., and [redacted] on behalf of [redacted] PARK INC., (a defunct corporation),

Petitioners

-against-

[redacted], TITLE GUARANTEE CO., COUNTY DOLLAR CORPORATION, [redacted], [redacted], [redacted], [redacted], [redacted], [redacted], [redacted].

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

APPENDIX TO PETITION

[redacted]
Petitioners Pro Se
177 Knowlton Road
Yonkers, New York 10705

SUBCHAPTER I.—GENERALLY

§ 1981. Equal rights under the law

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other. R.S. § 1977.

§ 1982. Property rights of citizens

All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property. R.S. § 1978.

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. R.S. § 1979.

§ 1985. Conspiracy to interfere with civil rights—Preventing officer from performing duties

(1) If two or more persons in any State or Territory conspire to prevent, by force, intimidation, or threat, any person from accepting or holding any office, trust, or place of confidence under the United States, or from discharging any duties thereof; or to induce by like means any officer of the United States to leave any State, district, or place, where his duties as an officer are required to be performed, or to injure him in his person or property on account of his lawful discharge of the duties of his office, or while engaged in the lawful discharge thereof, or to injure his property so as to molest, interrupt, hinder, or impede him in the discharge of his official duties;

Obstructing justice; intimidating party, witness, or juror

(2) If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified, or to influence the verdict, presentment, or indictment of any grand or petit juror in any such court, or to injure such juror in his person or property on account of any verdict, presentment, or indictment lawfully assented to by him, or of his being or having been such juror; or if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws;

Depriving persons of rights or privileges

(3) If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators. R.S. § 1980.

Historical Note

Derivation. Acts July 31, 1861, c. 33, 12 Stat. 284; Apr. 20, 1871, c. 22, § 2, 17 Stat. 13.

§ 1986. Same; action for neglect to prevent

Every person who, having knowledge that any of the wrongs conspired to be done, and mentioned in section 1985 of this title, are about to be committed, and having power to prevent or aid in preventing the commission of the same, neglects or refuses so to do, if such wrongful act be committed, shall be liable to the party injured, or his legal representatives, for all damages caused by such wrongful act, which such person by reasonable diligence could have prevented; and such damages may be recovered in an action on the case; and any number of persons guilty of such wrongful neglect or refusal may be joined as defendants in the action; and if the death of any party be caused by any such wrongful act and neglect, the legal representatives of the deceased shall have such action therefor, and may recover not exceeding $5,000 damages therein, for the benefit of the widow of the deceased, if there be one, and if there be no widow, then for the benefit of the next of kin of the deceased. But no action under the provisions of this section shall be sustained which is not commenced within one year after the cause of action has accrued. R.S. § 1981.

§ 1994. Peonage abolished

The holding of any person to service or labor under the system known as peonage is abolished and forever prohibited in any Territory or State of the United States; and all acts, laws, resolutions, orders, regulations, or usages of any Territory or State, which have heretofore established, maintained, or enforced, or by virtue of which any attempt shall hereafter be made to establish, maintain, or enforce, directly or indirectly, the voluntary or involuntary service or labor of any persons as peons, in liquidation of any debt or obligation, or otherwise, are declared null and void. R.S. § 1990.

Section 10, Clause 1. Treaties, letters of marque and reprisal

No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; • • •

Section 10, Clause 1, continued. Coinage of money

• • • coin Money; • • •

Section 10, Clause 1, continued. Bills of attainder; ex post facto laws

• • • pass any Bill of Attainder, ex post facto Law, • • •

Section 10, Clause 1, continued. Impairment of contracts; title of nobility.

• • • or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

AMENDMENT V—CAPITAL CRIMES; DOUBLE JEOPARDY; SELF-INCRIMINATION; DUE PROCESS; JUST COMPENSATION FOR PROPERTY

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT XIII—SLAVERY ABOLISHED

Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Section 2. Congress shall have power to enforce this article by appropriate legislation.

AMENDMENT XIV.—CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; APPORTIONMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Saul STAMBLER, Rose Stambler, Empire Park, Inc. (a defunct corporation), Empire Park, Inc. and Prudential Operating Co., Inc., Plaintiffs,

v.

John J DILLON, Title Guarantee Co., Peter Wasylec, Marcy Finke, George B. Gordon, David Avstreih, Leonard Weiss, John J. O'Malley and County Suiter Corporation, Defendants.

No. 68 Civ 887.

United States District Court
S. D. New York.

July 12, 1968.

Complaint against state judge for violation of constitutional rights, wherein judge moved to dismiss complaint. The District Court, McGohey, J., held that, in absence of allegation or showing that state judge had discriminated against any plaintiff because of color, complaint failed to state claim against judge under federal statute providing for equality of right regardless of color and that complaint alleging only that state judge had participated in alleged conspiracy and showing only that he performed normal duties of his office in trial and decision of issues in strongly contested litigation failed to state claim against judge on ground that he had conspired to deprive plaintiff of constitutional rights.

Summary judgment entered dismissing complaint.

1. Declaratory Judgment ⇐224

Although sections cited in complaint had no application to subject matter of action, where it was clear from prayer for relief that pleader intended to assert jurisdiction under similarly numbered sections authorizing declaratory judgments, complaint would be deemed amended accordingly. 28 U.S.C.A. §§ 2201, 2202.

2. Courts ⇐284

Federal district court had jurisdiction of action brought against state judge

for deprivation of constitutional rights. 28 U.S.C.A. § 1343.

3. Judges ⇐36

Doctrine of judicial immunity does not preclude granting of injunctive relief against judge in proper case in which no money damages are sought to be recovered from judge.

4. Civil Rights ⇐13

In absence of allegation or showing that state judge had discriminated against any plaintiff because of color, complaint failed to state claim against judge under federal statute providing for equality of right regardless of color. 42 U.S.C.A. §§ 1981, 1982.

5. Conspiracy ⇐18

Complaint alleging only that state judge had participated in alleged conspiracy and showing only that he performed normal duties of his office in trial and decision of issues in strongly contested litigation failed to state claim against judge on ground that he had conspired to deprive plaintiff of constitutional rights. 42 U.S.C.A. §§ 1981–1983, 1985, 1986.

6. Action ⇐6

Frivolous claims must be disregarded.

Saul Stambler, Rose Stambler, pro se on behalf of themselves and the Corporate plaintiffs.

Louis J. Lefkowitz, Atty. Gen., of the State of New York, New York City, for defendant John J. Dillon; Mortimer Sattler, Asst. Atty. Gen., of counsel.

McGOHEY, District Judge.

The defendant John J. Dillon, a justice of the New York Supreme Court, Westchester County has moved pursuant to clauses (1), (2) and (6) of Federal Civil Rule 12(b) to dismiss the complaint for lack of both subject matter and personal jurisdiction and for failure to state a claim upon which relief may be granted; and pursuant to Rule 56(b) for summary judgment in his favor. An opposing affidavit of Saul Stambler, factual matters in his brief and papers heretofore filed herein in this Court having been received and considered on this motion, it is treated and disposed of as provided in Rule 56.

[1] The complaint, which is far from a model of concise pleading, asserts in paragraph FIRST that the Court's jurisdiction "arises under Title 28 U.S.C., Sections 1331, 1332 and 1343; Title 42 U.S.C., Sections 1981, 1982, 1983, 1985, 1986; 2201 and 2202 (sic). The Constitution of the United States and in particular the Fifth, Sixth, Seventh, Eighth, Thirteenth and Fourteenth Amendments thereto." Sections 2201 and 2202 of Title 42, which prescribe the powers of the Atomic Energy Commission, have no application to the subject matter of this action. However, since it is clear from the prayer for relief that the pleader intended to assert jurisdiction under the similarly numbered sections of Title 28, which authorize declaratory judgments, paragraph FIRST will be deemed amended accordingly.

The plaintiffs were the unsuccessful parties in three related civil actions which by order of Justice Dillon were tried together before him. The defendants, other than he, were the successful parties, their trial counsel, a trial witness and others alleged to have participated in certain real estate transactions which were the subject matter of those actions. Claiming that the plaintiffs' defeat in the State Court resulted from a conspiracy among Justice Dillon acting under color of law and the other defendants to deprive the plaintiffs of their property without due process of law, equal protection of the laws and other constitutional and statutory rights, the complaint seeks a judgment declaring the State Court judgment null and void and an injunction restraining all the defendants from enforcing it; and from "impeding, intimidating, hindering and preventing the plaintiffs from exercising the rights, privileges and immunities guaranteed to them by the Constitution and Laws of the United States." It also

seeks damages of $500,000 from all the defendants other than Justice Dillon.

Paragraph SECOND sub. par. 9 of the complaint alleges that Justice Dillon is included as a co-defendant "to establish his part in the conspiracy which is the subject of this action and to give the Court jurisdiction over the acts which are in violations (sic) of the plaintiffs' rights, privileges and immunities, to give the Court the power to halt and enjoin said acts of the conspiracy to mitigate the damage to these plaintiffs." The acts by which it is alleged Justice Dillon furthered the conspiracy are, as set forth in paragraphs FOURTEENTH through TWENTY-FOURTH, that in July 1964, over the plaintiffs' objection, he consolidated the State Court actions for trial before himself during the following September; that on September 25 he denied the plaintiffs' motion for adjournment and during the trial favored their adversaries by his rulings on evidence and by his final decision, a copy of which marked exhibit B is annexed to and made part of the complaint; that by his decision, though lacking jurisdiction to do so and in the absence of an indictment, he "convicted" Saul Stambler of fraud and deceit; imposed "involuntary servitude" on him and subjected the plaintiffs to "harsh and shameful punishment."

The State Court actions arose out of the defendant Wasylec's efforts under pressure of time to acquire title to a portion of a gore running through a large parcel of real property he was under contract to sell. He ultimately acquired title to the needed piece for $15,000 from Saul Stambler who, under circumstances stated in Justice Dillon's decision, had acquired it only shortly before at a much lower price. In the first of the State Court actions Wasylec sued to recover the $15,000. Justice Dillon concluded that Saul Stambler had practiced fraud and deceit on his vendors and, therefore, should not be permitted to profit by his wrong. Saul Stambler claims this denied him due process in violation of the Fourteenth Amendment and constituted his "conviction" of a crime, while denying him his right to have the evidence against him considered by a grand jury and also his right to a public trial by a jury of his peers, all in violation of the Fifth and Sixth Amendments. Justice Dillon awarded Wasylec $12,000, allowing Stambler and his associates to retain $3,000 for their expenses and his services in locating his vendors and acquiring their title. Saul Stambler claims this deprived him of his property without due process in violation of the Fourteenth Amendment and also subjected him to "involuntary servitude" in violation of the Thirteenth Amendment since, he contends, he never agreed to work for Wasylec. It may be that this is also the "harsh and shameful punishment" referred to above and constitutes the claimed violation of the Eighth Amendment. It is not clear just how it is claimed the Seventh Amendment was violated.

Judgment on Justice Dillon's decision was entered on April 22, 1965, and affirmed by the Appellate Division, Second Department on June 12, 1967.[1] An appeal to the Court of Appeals was dismissed on November 2, 1967.[2] The notice of appeal stated that the appellants were "relying solely upon the questions directly involving the provisions of Article 1, Sections 1, 5, 6, 7 and 11 of the Constitution of the State of New York and Amendments Fifth, Thirteenth and Fourteenth, Sec. 1 of the Constitution of the United States and Title 42 Sec. 1994 of the United States Code, • • •." Chief Judge Fuld's order of dismissal states its ground to be "that no constitutional question is involved."[3] The plaintiffs, as far as appears, did not seek Su-

1. Wasylec v. Stambler, 28 A.D.2d 825, 282 N.Y.S.2d 665 (App.Div.1967).

2. 20 N.Y.2d 688 (1967).

3. The notice of appeal and order of dismissal are incorporated in an affidavit by the defendant Leonard Weiss filed on March 3, 1968, in opposition to the plaintiffs' motion for a preliminary injunction. This was denied by Judge Herlands whose order, entered March 28, 1968, is the subject of a pending appeal by the plaintiffs.

preme Court review. They commenced the instant action on February 8, 1968. The complaint was filed by an attorney who, it is alleged, has since withdrawn. The action is now being prosecuted by the Stamblers in person.[4]

[2] The court clearly has jurisdiction of the action as against Justice Dillon under section 1343 of Title 28 U.S.C. Accordingly, it is unnecessary to consider whether as against him jurisdiction also exists under sections 1331 and 1332 of that title as alleged in the complaint. The question remains whether the complaint states any claim against Justice Dillon on which relief may be granted and again it is clear it does not.

[3] Initially it should be noted that the Attorney General's reliance on the doctrine of judicial immunity is misplaced. Pierson v. Ray[5] and Morgan v. Sylvester[6] which he cites were both actions seeking money damages. No damages are sought to be recovered from Justice Dillon and the doctrine does not preclude the grant of injunctive relief against a judge in a proper case.[7]

[4] Sections 1981 and 1982 of Title 42 U.S.C. both provide for equality of rights regardless of color. Here it is neither alleged nor shown that Justice Dillon discriminated against any plaintiff because of color. Accordingly, the complaint fails to state a claim against Justice Dillon on which relief may be granted under either of these sections.[8]

Section 1986 which grants only an action for damages, likewise affords no basis for a relievable claim since no claim for damages is asserted against Justice Dillon.

[5] There remains to be considered the claimed conspiratorial deprivation of the plaintiffs' rights by Justice Dillon. Whether such a claim may be laid under sections 1983 and 1985 of Title 42 need not be decided here for in any event the complaint fails to allege sufficient facts to show that Justice Dillon was part of any such conspiracy if one existed.[9] The complaint does no more than charge Justice Dillon in the most general terms with participation in the alleged conspiracy. This is not enough.[10] Apart from the allegations which will be considered later that Saul Stambler was "convicted" and subjected to "involuntary servitude," the complaint shows only that the judge performed the normal duties of his office in the trial and decision of the issues in a strongly contested litigation.

[6] The claims of "conviction" and "involuntary servitude" are, as the complaint on its face shows, frivolous and must be disregarded.[11]

The motion, treated as one for summary judgment, is granted.

Summary judgment dismissing the complaint against the defendant John J. Dillon may be entered forthwith, since there is no just reason for delay.[12]

4. Saul Stambler's affidavit in opposition to the instant motion.

5. 386 U.S. 547, 87 S.Ct. 1213, 18 L.Ed.2d 288 (1968).

6. 125 F.Supp. 390, Aff'd. 220 F.2d 758, Cert. denied 350 U.S. 887, 76 S.Ct. 112, 100 L.Ed. 783, rehearing denied 350 U.S. 939, 76 S.Ct. 291, 100 L.Ed. 825 (1956).

7. See United States v. Clark, 249 F.Supp. 720, 727 (S.D.Ala.1965).

8. Agnew v. City of Compton, 239 F.2d 226, 230 (9th Cir. 1957).

9. See Powell v. Workmen's Compensation Board of the State of New York, 327 F.2d 131, 137 (2 Cir. 1964).

10. Id.

11. See Jemsura v. Belden, 281 F.Supp. 200 (N.D.N.Y.1968).

12. Rule 54(b) Federal Rules of Civil Procedure.

293 F.Supp.—41½

acting and conspired in such a way as to violate various civil rights statutes. The District Court, Herlands, J., held that the amended complaint was insufficient to state a cause of action.

Amended complaint dismissed.

1. Civil Rights ⇐13

Where plaintiffs appeared pro se and raised claim under the civil rights statutes, the court gave a liberal reading to the amended complaint. 42 U.S.C.A. § 1981 et seq.

2. Civil Rights ⇐13

Where a litigant raises claims under civil rights statutes, even though complaint appears to be insubstantial, the most appropriate approach is to assume jurisdiction and then decide whether the pleading states a claim for relief. 42 U.S.C.A. § 1981 et seq.

3. Judges ⇐49(1)

A charge that a judge who rules against litigant is thereby inevitably prejudiced against him is frivolous and harassing.

4. Courts ⇐282(1)

The court has jurisdiction under statute giving district court jurisdiction where matter in controversy exceeds $10,000 and arises under Constitution, or treaties of United States if a cause of action is alleged under the Fifth, Sixth, Thirteenth and Fourteenth Amendments and the jurisdictional amount exists. 28 U.S.C.A. § 1331; U.S.C.A.Const. Amends. 5, 6, 13, 14.

5. Conspiracy ⇐18

Amended complaint, indicating that plaintiffs were unsuccessful plaintiffs in civil actions in New York court and alleging a conspiracy between New York judge and the other defendants to deprive plaintiffs of their property without due process of law and in violation of equal protection clause of Fourteenth Amendment stated no claim upon which relief could be granted under statutes implementing Thirteenth and Fourteenth Amendments and prohibiting denial of

Saul STAMBLER, Rose Stambler, Empire Park, Inc. (a defunct corporation), Empire Park, Inc., Prudential Operating Co., Inc., Plaintiffs,

v.

John J. DILLON, Title Guarantee Co., Peter Wasylec, Marcy Finke, George B. Gordon, David Avstreih, Leonard Weiss, John J. O'Malley, County Dollar Corporation, Defendants.

No. 68 Civ. 537.

United States District Court S. D. New York.

June 23, 1969.

The plaintiffs alleged in their amended complaint that the defendants

equal protection of the laws on grounds of race or color and guaranteeing to non-white citizens equal property rights with white persons. 42 U.S.C.A. §§ 1981, 1982; U.S.C.A.Const. Amends. 13, 14.

6. Civil Rights ⇐13

The requirement that action be taken under color of state law is indispensable to establishment of claim for relief under statute giving right of action in tort to every individual whose federal rights are infringed by any person acting under color of state law; although state officials are usually the only people who can act with the authority of the state in order for there to be a misuse of power derived from the state, state action can be established if defendants who are not connected with the state are willful participants in joint activity with the state or its agents. 42 U.S.C.A. § 1983.

7. Civil Rights ⇐13

New York judge was immune from liability under civil rights action which asserted that plaintiffs were unsuccessful parties in civil actions in New York court and that there was a conspiracy between New York judge and the other defendants to deprive plaintiffs of their property without due process of law and in violation of equal protection clause of Fourteenth Amendment and other constitutional rights, and other defendants who were successful parties in state court, their trial counsel, a trial witness and others alleged to have participated in real estate transactions which were subject matter of state court actions did not act under color of state law or state authority for purposes of civil rights act. 42 U.S.C.A. §§ 1981–1986.

8. Civil Rights ⇐13

Attorneys are not state officers, but private persons, for purposes of civil rights act. 42 U.S.C.A. § 1983.

9. Civil Rights ⇐13

A witness at a trial is not acting under color of state law for civil rights purposes. 42 U.S.C.A. § 1983.

10. Federal Civil Procedure ⇐1781

Where it appeared beyond doubt that plaintiffs could prove no set of facts to support their allegations of state action in their civil rights action, the amended complaint was dismissed for failure to state a claim. 42 U.S.C.A. §§ 1981–1986, 1994; Fed.Rules Civ.Proc. rule 12(b) (1, 2, 6), 28 U.S.C.A.

11. Civil Rights ⇐1

The civil rights statute cannot be used to redress what are essentially infringement of property rights. 42 U.S.C.A. § 1983.

12. Conspiracy ⇐18

Amended complaint indicating that plaintiffs were unsuccessful parties in civil actions in New York court and alleging a conspiracy between New York judge and the defendants to deprive plaintiffs of equal protection of laws was insufficient to state cause of action for conspiracy to interfere with civil rights. 42 U.S.C.A. § 1985.

13. Federal Civil Procedure ⇐2737

Even though plaintiffs' civil rights suit was unfounded and was probably maintained in bad faith, where plaintiffs had been granted leave to file an amended complaint, plaintiffs would not be taxed with attorneys' fees. 42 U.S.C.A. § 1981 et seq.

Saul Stambler, Rose Stambler, pro se.

Louis J. Lefkowitz, Atty. Gen., of State of New York, for defendant John J. Dillon; Mortimer Sattler, New York City, of counsel.

Avstreih, Martino & Weiss, Mt. Vernon, for defendants David Avstreih, Leonard Weiss, Peter Wasylec; Leonard A. Weiss, Mount Vernon, of counsel.

Daniel Goldberg, New York City, for defendant George B. Gordon.

Finke, Jacobs & Hirsch, New York City, for defendant Marcy Finke; Louis Gruss, New York City, of counsel.

John J. Boyle, New York City, for defendants County Dollar Corporation, Title Guarantee Co., John J. O'Malley.

OPINION

HERLANDS, District Judge:

The amended complaint in the instant action alleges that the defendants acted and conspired in such a way as to violate various civil rights statutes, *inter alia*, 42 U.S.C. §§ 1981, 1982, 1983, 1985, 1986, 1994, and the Fifth, Sixth, Thirteenth and Fourteenth Amendments to the United States Constitution. Plaintiffs assert that jurisdiction arises under 28 U.S.C. §§ 1331, 1332 and 1343; and declaratory relief is sought under 28 U.S.C. §§ 2201 and 2202.

Answers by all the defendants except Justice Dillon assert the defenses of lack of subject matter jurisdiction, lack of in personam jurisdiction, res judicata and failure to state a claim upon which relief can be granted.

By this group of motions all the defendants move to dismiss the amended complaint under Fed.R.Civ.P. 12(b) (1), (2) and (6) for lack of subject matter jurisdiction; lack of jurisdiction over the person; for failure to state a claim; and, alternatively, defendants urge the Court to grant summary judgment dismissing the complaint for failure to state a claim. An injunction prohibiting the plaintiffs from continuing the instant action any further is also sought along with sanctions and costs.

The Court finds it unnecessary to consider matter submitted outside the pleadings and hereby holds that the amended complaint fails to state a claim for relief as against any and all the defendants.

[1] Because plaintiffs appear *pro se* and raise claims under the Civil Rights Statutes, 42 U.S.C. § 1981 *et seq.*, the Court has given a liberal reading to the amended complaint but still finds it entirely inadequate for reasons elaborated upon below.

[2] Where a litigant raises claims under the Civil Rights Statutes, even though a complaint appears to be insubstantial, the more judicious approach is to assume jurisdiction and then decide whether the pleading states a claim for relief. *See, e. g.*, United States v. Guest, 383 U.S. 745, 756, 86 S.Ct. 1170, 16 L.Ed.2d 239 (1966); Bell v. Hood, 327 U.S. 678, 66 S.Ct. 773, 90 L.Ed. 939 (1946); Rhodes v. Meyer, 334 F.2d 709 (8th Cir. 1964), cert. denied, 379 U.S. 915, 85 S.Ct. 263, 13 L.Ed.2d 186 (1964); Jemzura v. Belden, 281 F.Supp. 200 (N.D.N.Y.1968); Joe Louis Milk Co. v. Hershey, 243 F.Supp. 351 (N.D.Ill. 1965); Olson v. Board of Ed., 250 F. Supp. 1000 (E.D.N.Y.1966); Campbell v. Glenwood Hills Hospital, Inc., 224 F. Supp. 27 (D.Minn.1963).

The Amended Complaint

The facts alleged in the amended complaint indicate that plaintiffs were unsuccessful parties in three civil actions consolidated and tried before Justice Dillon in the New York State Supreme Court, in and for the County of Westchester. The defendants in the instant action include Justice Dillon, the successful parties in the state court actions, their counsel, a trial witness and others alleged to have participated in certain real estate transactions which were the subject matter of those actions.

[3] The amended complaint alleges a conspiracy between Justice Dillon and the other defendants to deprive plaintiffs of their property without due process of law and in violation of the equal protection clause of the fourteenth amendment and other constitutional rights, and seeks an order declaring the state court judgment null and void, a permanent injunction restraining all defendants from enforcing that judgment, and damages in the amount of $500,000. from all the defendants other than Justice Dillon.[1]

1. Judicial notice may be taken that the judgment in the state court actions was unanimously affirmed on June 12, 1967 by the Appellate Division, Second Department. Wanylec v. Stambler, 28 A.D.2d 825; County Dollar Corp. v. Empire Park, 28 A.D.2d 822; Prudential Operating Co. v. Wanylec, 28 A.D.2d 824; all three decisions reported in 282 N.Y.S. 2d 695. Appeals were taken to the New

Prior Proceedings

1. This Court denied a preliminary injunction on March 28, 1968 noting that "there is more than a substantial doubt whether there is subject matter jurisdiction and whether plaintiffs have stated a claim upon which relief can be granted." [1]

2. On July 13, 1968, Judge McGohey granted Justice Dillon's motion for summary judgment dismissing the complaint for failure to state a claim under §§ 1981, 1982, 1983 and 1985, 288 F.Supp. 646. Judge McGohey was of the view that, if in fact Justice Dillon did act without jurisdiction, the doctrine of judicial immunity was inapplicable to him and that, consequently, the district court did have subject matter jurisdiction under 28 U.S.C. § 1343. He held, however, that the complaint failed to state a cause of action under §§ 1981 and 1982, inasmuch as they deal only with racial discrimination, and none was alleged in the complaint; that § 1986 was inapplicable to Justice Dillon because no damages were sought against him; that he need not decide whether plaintiffs stated a claim under §§ 1983 and 1985 "for in any event the complaint fails to allege sufficient facts to show that Justice Dillon was part of any such conspiracy if one existed. The complaint does no more than charge Justice Dillon in the most general terms with participation in the alleged conspiracy. This is not enough. • • • The complaint shows only that the judge performed the normal duties of his office in the trial and decision of the issues in a strongly contested litigation."

Plaintiffs' claim of involuntary servitude and Saul Stambler's claim, in the original complaint, that he was convicted of fraud and deceit without a trial, were found frivolous by Judge McGohey.

3. Judge Tenney, on October 7, 1968, granted plaintiffs leave to file an amended complaint pursuant to Rules 59(e) and 15(a) of the Federal Rules of Civil Procedure, in order to give them "an additional opportunity to allege 'with at least some degree of particularity overt acts which defendants engaged in which were reasonably related to the promotion of the claimed conspiracy', Powell v. Workmen's Compensation Bd., 321 [327] F.2d 131, 137 (2d Cir. 1964)". Judge Tenney specifically stated that the court expressed no opinion as to whether plaintiffs could eventually state a cause of action.

In addition, Judge Tenney granted the defendants' motions to dismiss the complaint as to the corporate plaintiffs because they were not represented, as required, by an attorney at law.

York Court of Appeals, which on November 2, 1967 granted motions to dismiss the appeals. 20 N.Y.2d 883.

2. When the instant motions were heard on January 14, 1969, plaintiff, Saul Stambler, appeared and submitted an affidavit to the Court in which he requested that the writer of this opinion disqualify himself from rendering a decision on these motions on the grounds of possible bias and prejudice. The charge of prejudice is grounded on the facts that, in denying plaintiffs' motion for a preliminary injunction, the Court's memorandum opinion, which discussed the events surrounding the state court proceedings, stated that Justice Dillon "characterized certain conduct of Saul Stambler, • • •, as amounting to deceit."; and that the denial of the motion for a preliminary injunction was erroneous.

A charge that a judge who rules against a litigant is thereby inevitably prejudiced against him is frivolous and harassing. Ironically, the unfounded application for this Court's disqualification parallels, in its logic, the very gist of plaintiffs' complaint in the instant action—his frustration with the result reached by Justice Dillon in the state court actions. The application to recuse for prejudice is hereby denied.

After submitting the above-mentioned affidavit, Saul Stambler submitted no further papers in opposition to the instant motions. Because the Court concludes that the amended complaint fails to state a cause of action, without looking outside the pleadings, plaintiffs have in no way been prejudiced by their failure to submit affidavits or other papers.

Judge Tenney denied the motions to dismiss made by the defendants other than Justice Dillon, as premature, in view of the fact that he was granting leave to amend the complaint.[3]

The Court presently has the amended complaint before it, and the renewed motions by all the defendants.

Discussion

[4] We note initially that plaintiffs invoke the jurisdiction of the Court under 28 U.S.C. §§ 1331, 1332 and 1343. There is no diversity and, therefore, no jurisdiction under § 1332. The court does have jurisdiction under § 1331 if a cause of action is alleged under the fifth, sixth, thirteenth and fourteenth amendments and the jurisdictional amount exists; and under § 1343, if a cause of action is stated under the civil rights act. As indicated above, the Court will assume jurisdiction in order to determine whether plaintiffs have stated a claim for relief.

The Court will consider seriatim each section of the Civil Rights Statute invoked by plaintiffs and each amendment to the constitution.

Sections 1981 and 1982

[5] Sections 1981 and 1982 of title 42 are implementations of the thirteenth and fourteenth amendments and prohibit the denial of equal protection of the laws on the grounds of race or color; and guarantee to non-white citizens equal property rights with white persons. Nothing in the amended complaint conceivably relates to these sections. Therefore, no claim upon which relief can be granted has been alleged under them.

Section 1983

[6] Section 1983 gives a right of action in tort to every individual whose federal rights are infringed by any person acting under color of state law. The protection is extended to any "rights, privileges, or immunities secured by the Constitution and laws".

The requirement that the action be taken under color of state law is indispensable to the establishment of a claim for relief. Although state officials are usually the only people who can act with the authority of the state in order for there to be a misuse of power derived from the state, *e. g.*, Monroe v. Pape, 365 U.S. 167, 184, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961); Collins v. Hardyman, 341 U.S. 651, 662, 71 S. Ct. 937, 95 L.Ed. 1253 (1951); United States v. Classic, 313 U.S. 299, 326, 61 S.Ct. 1031, 85 L.Ed. 1368 (1941); Jobson v. Henne, 355 F.2d 129, 133 (2d Cir. 1966); Pritt v. Johnson, 264 F. Supp. 167 (M.D.Pa.1967); Campbell v. Glenwood Hills Hosp., Inc., *supra*, state action can be established if the defendants who are not connected with the state are "wilful participant(s) in joint activity with the State or its agents". United States v. Price, 383 U.S. 787, 794 n. 7 86 S.Ct. 1152, 1157, 16 L.Ed.2d 267 (1966). Plaintiffs herein, seek to cloak the defendants with the authority of state law by alleging a conspiracy between them and Justice Dillon.

[7] There is no doubt that Justice Dillon is immune from any liability under the Civil Rights Act, *see, e. g.*, Pierson v. Ray, 386 U.S. 547, 87 S.Ct. 1213, 18 L.Ed.2d 288 (1967); Bradford Audio Corp. v. Pious, 392 F.2d 67 (2d Cir. 1968); Fanale v. Sheehy, 385 F.2d 866 (2d Cir. 1967); Beard v. Stephens, 372 F.2d 685 (5 Cir. 1967); Henig v. Odorisio, 385 F.2d 491 (3d Cir. 1967), cert. denied, 390 U.S. 1016, 88 S.Ct. 1269, 20 L.Ed.2d 166 (1967); Rhodes v.

3. On November 8, 1968 Judge Wyatt entered an order denying the application of plaintiffs for an order directing Justice Dillon to appear for the taking of depositions. The following comment by Judge Wyatt is pertinent:

"• • • such motions as the present are harassment to all those concerned. The plaintiffs are taking the time of judges of this Court to deal with essentially frivolous matters to the prejudice of other litigants in this Court. Plaintiffs are strongly advised to desist in such conduct. Continuation can only lead to the imposition of sanctions or the entry of an injunction against plaintiffs or both."

Meyer, 334 F.2d 709 (8th Cir. 1964), cert. denied, 379 U.S. 915, 85 S.Ct. 263, 13 L.Ed.2d 186 (1964); Morgan v. Sylvester, 220 F.2d 758 (2d Cir. 1955), aff'g, 125 F.Supp. 380 (S.D.N.Y.1954); Jemzura v. Belden, 281 F.Supp. 200 (N.D.N.Y.1968). *But see*, United States v. Clark, 249 F.Supp. 720 (S.D.Ala. 1965), where he acts within the course and scope of his judicial duties, as he has done in connection with the state court proceedings with which the instant action is concerned. Plaintiffs have thus failed to state a claim for relief against defendant Justice Dillon, and his motion to dismiss the amended complaint is hereby granted.[4]

The other defendants, who are private persons, cannot therefore be held liable under § 1983 because they did not act in conspiracy with a state official against whom a valid claim could be stated. Consequently, their allegedly wrongful actions were not done under color of state law or state authority. *See, e. g.*, Haldane v. Chagnon, 345 F. 2d 601, 604–605 (9th Cir. 1965); Jemzura v. Belden, *supra*, 281 F.Supp. at 206; Shakespeare v. Wilson, 40 F.R.D. 500, 504–505 (S.D.Cal.1966).

[8] Plaintiffs apparently allege that the defendant attorneys, as officers of the court, supply the requisite connection to state action under § 1983. It is well established that attorneys are not state officers, but private persons, for the purposes of the Civil Rights Act. *See, e. g.*, Haldane v. Chagnon, *supra*, 345 F.2d at 604; Meier v. State Farm Mutual Auto. Ins. Co., 356 F.2d 504 (7th Cir. 1966); Rhodes v. Meyer, *supra*; Jemzura v. Belden, *supra*; Pritt v. Johnson, *supra*.

[9] Nor is a witness at a trial acting under color of state law. *See, e. g.*, Pritt v. Johnson, *supra*.

[10] The Court concludes that the amended complaint fails to state a claim for relief under § 1983 against any of the defendants because Justice Dillon is immune, and the other defendants in no way acted under color of state law. Because it appears beyond doubt that plaintiffs can prove no set of facts to support their allegations of state action, the amended complaint is hereby dismissed for failure to state a claim. *See, e. g.*, Conley v. Gibson, 355 U.S. 41, 45–46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957).

[11] Moreover, even assuming *arguendo*, that the mere use of the courts by litigants and their counsel were held to satisfy the requisite state action, this circuit has held that 28 U.S.C. § 1983 cannot be used to redress what are essentially infringements of property rights. *See*, Bradford Audio Corp. v. Pious, *supra*, 392 F.2d at 72; *accord*, Howard v. Higgins, 379 F.2d 227 (10th Cir. 1967); Ream v. Handley, 359 F.2d 728 (7th Cir. 1966); Abernathy v. Carpenter, 208 F.Supp. 793 (W.D.Mo. 1962), aff'd, 373 U.S. 241, 83 S.Ct. 1295, 10 L.Ed.2d 409 (1963). But see Joe Louis Milk Co. v. Hershey, *supra*.

Stripped of its conclusory language, the gist of plaintiffs' amended complaint is that, as a result of Justice Dillon's decision in the consolidated state actions, they have been deprived of their property without due process of law because the judge acted without jurisdiction, and reached an improper and allegedly fraudulently induced result.

Plaintiff Saul Stambler also alleges that he was slandered because the judge remarked in the course of his opinion that Stambler had engaged in fraud and deceit; and that he has been compelled to labor for another without compensation as a result of the judge's decision which imposed a constructive trust on the property acquired by Stambler. These claims are clearly frivolous and do not magically transmute the complaint from one basically concerned with property rights into one seeking to protect plaintiffs' basic liberties.

4. Judicial immunity shelters the judge from civil liability under all the sections of the Civil Rights Act and, therefore, the complaint fails to state a claim against Justice Dillon under all the sections invoked by plaintiffs.

The amended complaint therefore fails to state a claim for relief under § 1983 for the additional reason that only property rights are in issue.

Section 1985

[12] Section 1985(1) is clearly inapplicable. Section 1985(2) provides for recovery of damages for injury suffered from any acts done in furtherance of a conspiracy "for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State * * * with intent to deny to any citizen equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, * * * to the equal protection of the laws". Plaintiffs allege *in haec verba* that defendants conspired with such a purpose in mind.

This section applies only to a conspiracy to deprive an individual of equal protection; and plaintiffs' amended complaint is devoid of any factual allegations to support the conclusorily claimed denial of equal protection. There are no allegations which indicate a "purposeful discrimination between persons or classes of persons" which is essential to support a claimed denial of equal protection; and the necessary discrimination "is not supplied by the opprobrious epithets 'willful' and 'malicious' * * * or by characterizing" what happened "as an unequal, unjust, and oppressive administration of the laws" of the state. Snowden v. Hughes, 321 U.S. 1, 10, 64 S.Ct. 397, 402, 88 L.Ed. 497 (1944) as cited in Morgan v. Sylvester, *supra*, 125 F.Supp. at 387; *accord*, Powell v. Workmen's Compensation Bd., 327 F.2d 131 (2d Cir. 1964).

The Court concludes that the amended complaint fails to state a claim for relief under 28 U.S.C. § 1985(2) because the conspiracy, if there was one, was not directed to the denial of equal protection of the laws, and it appears beyond doubt that plaintiffs can prove no set of facts to support the charge that they were denied the equal protection of the laws. *See, e. g.*, Conley v. Gibson, *supra*, 355 U.S. at 45–46, 78 S.Ct. 99.

In addition to the foregoing reason, the amended complaint also fails to state a claim because no facts are alleged "from which a reasonably-minded person can draw an inference of the alleged conspiracy" Morgan v. Sylvester, *supra*, 125 F.Supp. at 389. Section 1985 not only requires the existence of a conspiracy but acts in furtherance of the conspiracy. Plaintiffs have not satisfactorily alleged either. Plaintiffs characterize the acts of defendants as malicious, conspiratorial and done for the purpose of depriving plaintiffs of their constitutional rights. These characterizations are not supported by any facts and none of the overt acts which the amended complaint sets forth warrant an inference that a conspiracy existed whose purpose was to obstruct justice in order to deny plaintiffs the equal protection of the laws. *See, e. g.*, Collins v. Hardyman, 341 U.S. 651, 659–660, 71 S.Ct. 937, 95 L.Ed. 1253 (1951); Birnbaum v. Trussell, 347 F.2d 86 (2d Cir. 1965); Powell v. Workmen's Compensation Bd., *supra*; Huey v. Barloga, 277 F. Supp. 864, 868 (N.D.Ill.1967); Shakespeare v. Wilson, *supra*.

In relevant part, § 1985(3) allows an injured person to sue for damages where two or more persons conspire "for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws", and where an act has been done in furtherance of the conspiracy.

The amended complaint fails to state a claim for relief under this subsection of § 1985 for several reasons.

First, no factual allegations relate to the denial of equal protection or equal privileges and immunities, which are the only rights protected by § 1985(3). *See, e. g.*, Collins v. Hardyman, 341 U.S. 651, 661–662, 71 S.Ct. 937, 95 L.Ed. 1253 (1951); Sarelas v. Sheehan, 326 F.2d 490 (7th Cir. 1963); Walker v. Bank of America Nat'l Trust & Savings

Ass'n, 268 F.2d 16 (9th Cir. 1959); Shakespeare v. Wilson, *supra*; Bradford v. Lefkowitz, 240 F.Supp. 969 (S.D.N.Y. 1965); Morgan v. Sylvester, *supra*.

Plaintiffs merely describe their defeat in the state court litigation as amounting to a denial of equal protection. The Civil Rights Act was not intended to protect an individual from unfounded or even malicious claims in state courts, nor to provide a federal forum for review of state court litigation under the pretext that every defeated litigant can claim a denial of equal protection. The amended complaint does not in any way state a claim which is cognizable under § 1985(3) because the alleged conspiracy in no way deprived plaintiffs of equal protection or equal privileges and immunities. *Id.*

Second, § 1985(3) has been interpreted to require that the conspiracy to deny equal protection be executed under color of state law or authority. *See, e. g.*, Collins v. Hardyman, 341 U.S. 651, 657–658, 71 S.Ct. 937, 95 L.Ed. 1253; Huey v. Barloga, *supra*, 277 F.Supp. at 868, Campbell v. Glenwood Hills Hosp., Inc., *supra*, 224 F.Supp. at 29. The Court has already noted that no state action can be reasonably inferred from the allegations of the amended complaint.

Third, the conspiracy is alleged in conclusory terms only, despite the fact that plaintiffs were given leave to amend in order to "allege with some degree of particularity overt acts which defendants engaged in which were reasonably related to the promotion of the claimed conspiracy." The amended complaint merely describes the actions of the litigants and others involved in the state court proceedings who were seeking to protect their interest in the disputed real estate. Plaintiffs must do more than label as a conspiracy the actions of the defendants. *See* opinion of the Court, *supra* at 1256.

Section 1986

Section 1986 is a derivative section which gives a cause of action against one who neglects to prevent the commission of the wrongs done pursuant to a conspiracy under § 1985. Because it is derivative, the amended complaint fails to state a claim for relief under that section for the same reasons that no claim was made out under § 1985. *See, e. g.*, Huey v. Barloga, *supra*, 277 F. Supp. at 874–875.

The allegations relating to involuntary servitude under 42 U.S.C. § 1994, and under the thirteenth amendment are frivolous as are those under the fifth, sixth and fourteenth amendments.

Attorneys' Fees

[13] Plaintiffs' suit is unfounded and has probably been maintained in bad faith. Plaintiffs accuse defendants with participation in a fraud and conspiracy but have submitted an amended complaint which in no way sets forth in a legally sufficient manner the existence of any wrongdoing on the part of defendants despite the fact that leave had been granted for amendment of the original complaint to supply that deficiency. Plaintiffs were apparently fully aware that they had no facts with which they could support their reckless accusations.

The Court, however, in the exercise of its discretion, denies the grant of attorneys' fees as costs to defendants. Although plaintiffs' action may very well in fact have been frivolous and vexatious, a district judge applying the rules of procedure, granted plaintiffs leave to file an amended complaint. Where this is done, it would be unfair to penalize a litigant by taxing him with attorneys' fees whenever the amended complaint fails to withstand a motion to dismiss for failure to state a claim. Although this litigation is indeed baseless, it has not been so unconscionably oppressive and harassing to warrant the harsh sanctions sought by defendants.

The amended complaint herein is dismissed for its failure to state a claim upon which relief can be granted.

So ordered.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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SAUL STAMBLER and ROSE STAMBLER individually and SAUL STAMBLER on behalf of PRUDENTIAL OPERATING CO., INC., and EMPIRE PARK INC., and ROSE STAMBLER on behalf of EMPIRE PARK, INC., (a defunct corporation).

68 Civ. 537

Plaintiffs,

Opinion # 36269

-against-

JOHN J. DILLON, TITLE GUARANTEE CO., COUNTY DOLLAR CORPORATION, JOHN C. O'MALLEY, PETER WASYLEC, DAVID AVSTREIH, LEONARD WEISS, MARCY FINKE, GEORGE B. GORDON,

Defendants.

- -x

WYATT, District Judge,

This is a motion by plaintiffs, said to be under Fed. R. Civ. P. 59(e), to amend the judgment of this Court, entered June 23, 1969, dismissing the action as against all defendants for failure to state a claim upon which relief can be granted (Fed. R. Civ. P. 12(b) (6)). The judgment was entered by order of the late Judge Herlands who had filed an opinion on the same day. The amendment sought is to permit service of a further amended complaint and to order the deposition of Mr. Justice Dillon, a justice of the New York Supreme Court (Westchester County), one of the defendants.

The motion was pending before Judge Herlands when he died and has been referred to me by order of the Chief Judge,

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filed October 9, 1969.

Plaintiffs are acting for themselves, without the help of counsel.

This motion and the action itself are not only lacking in any merit but the frivolous and harassing character of the litigation furnishes a depressing example of waste of the time of many judges (and their supporting staffs) to the prejudice of other litigants with serious questions to be resolved. The same problem was before me earlier this year when I wrote (Ward v. Pennsylvania New York Central Transportation Company, 68 Civ. 1094, January 21, 1969; affirmed May 1, 1969 (unreported, slip opinions 2071-73), cert. denied ____U.S.____, 38 U.S.L.W. 3129 (Oct. 14, 1969) (No. 368)):

> "The problem disclosed by this motion is most troublesome for the efficient administration of justice. It springs from the fact that plaintiff is acting for himself, without counsel. He has an absolute right to do this because in federal courts 'the parties may plead and manage their own causes personally' or by counsel, according to 28 U.S.C. § 1654. This statute in one form or another has been on the books since the first Judiciary Act of September 24, 1789 (1 Stat. 73, 92).
>
> "Parties are not well advised, however, to act without counsel. I have never observed a meritorious civil cause of action prosecuted by a litigant without counsel. If a claim has merit, counsel can be found to advise and assist. If the claimant is without funds, legal aid societies are usually available. In recent years federal government programs have been developed specifically to make legal assistance in civil matters available to those without funds, for example, the 'Legal Services' program in the Economic Opportunity Act of 1964 as amended (see 42 U.S.C. § 2809(a) (3)).

"There seems little reason, therefore, why any civil claim, not frivolous, should nowadays be prosecuted by the claimant personally.

"The case at bar suggests that those who prosecute civil claims personally, do so because of mistaken views as to the merits in law of their claim and because of strong feelings of mistreatment by those made defendants.

"But when litigants act for themselves they take an unfair and disproportionate part of the Court's time by requiring long study and inexpert documents to discover what the claims are and whether they have any merit. This presents a challenge to the interests of the community as a whole."

The action was commenced, with an attorney acting for plaintiffs, on February 8, 1968. The following situation appears from the amended complaint.

The present plaintiffs were defendants in actions in the New York Supreme Court, Westchester County.

The present defendants, except defendant Mr. Justice Dillon, were parties to the actions in Westchester County or counsel therein or witnesses or participants in real estate transactions involved in the actions. There was a consolidation of the actions and a trial before Mr. Justice Dillon who made various decisions adverse to plaintiffs here, resulting in a judgment against them on April 22, 1965.

Judicial notice may be taken that this judgment was unanimously affirmed on June 12, 1967 by the Appellate Division, Second Department. Wasylec v. Stambler, 28 A.D. 2d 825; County Dollar Corp. v. Empire Park, 28 A.D. 2d 822; Prudential Operating Co. v. Wasylec, 28 A.D. 2d 824: all three

decisions reported 282 N.Y.S. 2d 465. Appeals were taken to the New York Court of Appeals, which on November 2, 1967 granted motions to dismiss the appeals. 20 N.Y. 2d 893.

The theory of this action at bar is that all the defendants, under color of State law, engaged in a conspiracy to deprive plaintiffs of their property in violation of constitutional rights and that this was intended to be done, and was done by means of the rulings of Mr. Justice Dillon in the lawsuit, some of which were contrary to law and some of which were in excess of the jurisdiction of the New York Supreme Court in which Mr. Justice Dillon sat.

The relief sought is a declaration of the State judgment is void, an injunction against its enforcement, and money damages (except as against Mr. Justice Dillon).

A motion by plaintiffs for a preliminary injunction was denied by Judge Herlands, with opinion, on March 28, 1968.

A notice of appeal was filed by plaintiffs on April 29, 1968. Nothing appears to have been done about the appeal except that a motion for a stay was made by plaintiffs in the Court of Appeals and denied on June 6, 1968, apparently the appeal is still pending in the Court of Appeals.

By notice filed July 8, 1968, plaintiffs stated that their attorney "because of ill health" had been "released from his duties" and that plaintiffs were prosecuting the action for themselves.

By order with opinion filed July 13, 1968, Judge McGohey directed summary judgment for Mr. Justice Dillon because "the complaint shows only that the judge performed the normal duties of his office in the trial and decision of the issues in a strongly contested litigation". Judgment in favor of Mr. Justice Dillon was entered on July 23, 1968. No appeal was taken from this judgment.

By order with opinion filed October 7, 1968, Judge Tenney granted a motion by plaintiffs to amend the judgment entered on the order of Judge McGohey and for leave to serve an amended complaint. In effect, this seems to have been to relieve plaintiffs of the final judgment entered in favor of Mr. Justice Dillon, which is authorized by Fed. R. Civ. P. 60 (b) (6).

Thereafter plaintiffs moved before me for an order directing the deposition of Mr. Justice Dillon in aid of an amended complaint. This motion was denied by order, with memorandum opinion, filed November 8, 1968.

An amended complaint was filed by plaintiffs on November 29, 1968.

On December 3, 1968, notice of appeal was filed by plaintiffs from the order of November 8, 1968. It may be doubted that such order is appealable.

The records on appeal on both appeals have been docketed in the Court of Appeals and the appeals are there pending.

All defendants moved to dismiss the action for failure of the amended complaint to state a claim upon which relief can be granted.

By order filed May 20, 1969, the Court of Appeals permitted removal of the records on appeal, presumably for use of Judge Herlands in considering the motions to dimiss.

By order, with opinion, filed June 23, 1969, Judge Herlands granted the motions. Judgment of dismissal was entered on the same day. In dealing with a request (which was denied) by defendants for counsel fees on the motions, Judge Herlands stated that the action was "unfounded and has probably been maintained in bad faith", that plaintiffs made "reckless accusations" and that the action was "indeed baseless".

No appeal was taken from the judgment entered on Judge Herland's order. The time to appeal has probably been extended by the making of the present motion. Gradix v. Kansal, 375 F. 2d 764 (2d Cir. 1967).

The present motion is supported only by arguments already rejected by Judge Herlands.

The motion is denied on the law and in the exercise of discretion.

The plaintiffs are ordered and directed to make no further motions or applications to this Court in this matter

and to file no further papers in this Court except such as may be necessary or appropriate in connection with any appeals taken to the Court of Appeals.

SO ORDERED.

Dated: New York, New York
October 24, 1969

INZER B. WYATT
United States District Judge

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 4 - September Term, 1970

(Argued September 14, 1970 Decided [illegible])

Docket No. 34334

Saul Stambler and Rose Stambler, individually and Saul Stambler on behalf of Prudential Operating Co., Inc., and Empire Park, Inc., and Rose Stambler on behalf of Empire Park, Inc., (a defunct corporation),

Plaintiffs-Appellants,

-v-

John J. Dillon, Title Guarantee Co., Granby Realty Corporation, John C. O'Malley, Peter Meylor, David Avstreih, Leonard Weiss, Harry Finke, George Gordon,

Defendants-Appellees.

Before:

WATERMAN, MOORE and SMITH,

Circuit Judges.

Saul Stambler, Rose Stambler, Yonkers, N.Y., pro se

Samuel A. Hirshowitz, First Asst. Attorney General, Shirley Kottler, Asst. Attorney General, Louis J. Lefkowitz, Attorney General of New York, for appellees Dillon, [illegible]

Leonard Weiss, Avstreih, Marino & Weiss, N. Tarrytown, N.Y., for appellees Meylor, Avstreih, Weiss and Gordon,

John J. Doyle, New York City, for appellees Title Guarantee, O'Malley and Granby Realty Corp.

Harry Finke, Finke, Jacobs & Hirsch, New York City, for appellee Finke.

In the within case a judgment was entered in the United States District Court for the Southern District of New York dismissing appellants' amended complaint on the ground that it failed to state a claim upon which relief could be granted. A motion to amend that judgment and for leave to file and serve a second amended complaint who denied and a petition to reargue this motion and for alternative relief was also denied.

From the judgment and post-judgment orders plaintiffs appealed. An exhaustive brief and appendix were filed by appellants pro se, and four separate briefs were filed by their respective counsel on behalf of appellee Harry Finke, appellee John J. Dillon, appellees Peter Vasylos, David Bregstein, Leonard Weiss and George B. Gordon, and appellees Title Guarantee Company, John C. O'Malley and County Builder Corporation, after which appellants timely filed their reply brief.

The appeal was brought on for argument on September 14, 1970, and the court having heard Saul Stambler pro se for appellants and Norbinar Sattler, Assistant Attorney General of the State of New York, and Leonard Weiss, Esq. for appellees, and having considered the record of the case and the briefs and oral representations of counsel, and after due deliberation has been had, it is by the court ORDERED, ADJUDGED and DECREED

that the judgment entered below dismissing appellants' complaint and the post-judgment orders denying appellants' post-judgment motions are affirmed.

Judges of the U. S. Court of Appeals for the Second Circuit

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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SAUL STAMBLER and ROSE STAMBLER individually and SAUL STAMBLER on behalf of PRUDENTIAL OPERATING CO. INC., and EMPIRE PARK INC. and ROSE STAMBLER on behalf of EMPIRE PARK, INC., (a defunct corporation)

Plaintiffs

-against-

JOHN J. DILLON, TITLE GUARANTEE CO., COUNTY DOLLAR CORPORATION, JOHN C. O'MALLEY, PETER WASYLEC, DAVID AVSTREIH, LEONARD WEISS, MARCY FINKE, GEORGE B. GORDON.

Defendants.

- - - - - - - - - - - - - - - - - - - -

68 CIVIL 537

AMENDED COMPLAINT

Plaintiffs, for their verified complaint, allege:

JURISDICTION

FIRST: The jurisdiction of this Court over this complaint arises under Title 28 U.S.C., Sections, 1331, 1332 and 1343, 2201 and 2202; Title U.S.C., Sections 1981, 1982, 1983, 1985, 1986, 1994; the Constitution of the United States and in particular, Article 1, Sec. 10, and the Fifth, Sixth, Thirteenth and Fourteenth Amendments, thereto.

The matter in controversy exceeds, exclusive of interest and costs, the sum of $10,000.00. One of the purposes of this action is to enjoin the defendants from the enforcement and execution of a judgment obtained by them

which judgment is claimed to be invalid as in repugnance to the aforesaid constitutional provisions under which this action is brought.

PARTIES

SECOND: (a) Plaintiffs

1. Saul Stambler (hereinafter called Stambler) is a citizen of the United States and a resident of the City of Yonkers, County of Westchester and State of New York. Stambler is an investigator and process server and has, as a specialty, assisted in establishing the good and marketable titles to real property by the purchase of outstanding minor interests. Stambler has never been indicted by a grand jury for any crime, nor tried by a court and jury, nor convicted of any crime.

Stambler brings this action individually and as an officer, stockholder and director on behalf of

Prudential Operating Co., Inc., a New York corporation, hereinafter called Prudential, and

Empire Park, Inc., a New York corporation, hereinafter called Empire II.

2. Rose Stambler (hereinafter called Mrs. Stambler) is a citizen of the United States and a resident of the City of Yonkers, County of Westchester and State of New York. She is a housewife, but, on occasion, works with Stambler, her husband, in his various endeavors for their mutual benefit. She has never been indicted by a grand jury for

any crime, nor tried by a court and jury, nor convicted of any crime.

Mrs. Stambler brings this action individually and as a stockholder and director of Empire Park, Inc., a defunct New York corporation, hereinafter called Empire I.

(d) Defendants

1. John J. Dillon, (hereinafter called Dillon) is a resident of the State of New York. Dillon is a justice of the Supreme Court of the State of New York.

The jurisdiction of Dillon, is based on the exception to the doctrine of judicial immunity established in Bradley v Fisher, 80 U.S. 335, 351 (1871) wherein it is stated:

> "WHERE THERE IS CLEARLY NO JURISDICTION OVER THE SUBJECT-MATTER ANY AUTHORITY EXERCISED IS A USURPED AUTHORITY, FOR THE EXERCISE OF SUCH AUTHORITY, WHEN THE WANT OF JURISDICTION IS KNOWN TO THE JUDGE, NO EXCUSE IS PERMISSIBLE."

No monetary damages are asked of this defendant.

2. The Title Guarantee Company is an insurance company chartered in New York State in 1883, (hereinafter called Title Guarantee). It examines the records of real property titles, certifies the ownership and, on the basis of its certification, insures the title to real property.

3. County Dollar Corporation is a New York Corporation, (hereinafter called County Dollar) and is an owner and operator of real property at Yonkers, New York known as Cross County Center.

4. John C. O'Malley (hereinafter called O'Malley) is a resident of the State of New York, an attorney at law and officer of the Court and a member of the firm O'Malley & Boyle.

5. Peter Wasylec, (hereinafter called Wasylec) is a resident of the State of New York. Wasylec is a draftsman by trade.

6. David Avstreih is a resident of the State of New York, a member of the law firm of Avstreih, Martino and Weiss, and an officer of the Court.

7. Leonard A. Weiss (hereinafter called Weiss) is a resident of the State of New York and associated with Avstreih. He is an officer of the Court.

8. George Byron Gordon, (hereinafter called Gordon) is a citizen of the United States and a resident of the State of New Jersey.

9. Marcy Finke, (hereinafter called Finke) is a citizen of the United States and an attorney at law, and an officer of the Court. He is a member of the law firm Finke, Jacobs and Hirsch.

THIRD: (a) That, on information and belief, at divers times, from on or about February 1961 to the present date, the defendants herein conspired, each with the others (as more particularly set forth hereinafter) for the purpose of impeding, hindering, obstructing and defeating the due course of justice in the State of New York with intent to deny to the plaintiffs herein the equal protection of the

laws and for the purposes of depriving the plaintiffs of their right to be treated in accordance with due process of law; and to be free of involuntary servitude, that the acts hereinafter set forth, in accordance with said conspiracy, were wilful and malicious; and designed to discriminate against the plaintiffs and deprive them of their rights, privileges and immunities as secured by Article 1, Section 10 and the Fifth, Sixth, Seventh, Eighth, Thirteenth and Fourteenth Amendment to the Constitution of the United States and Title 42 U.S.C., sections 1981, 1982, 1983, 1985, 1986, 1994; and under Title 28 U.S.C., sections 1331, 1332, 1343, 2201 and 2202.

(b) That defendants and each of them conspired to damage plaintiffs in their trade and occupation and to interfere with their ability to earn a livelihood by engaging in a conspiracy to limit the use of plaintiffs' freedom by the illegal use of the state judicial power.

(c) That, on information and belief, such malicious acts were accomplished by the misuse of power possessed by virtue of state law and made possible because the wrongdoers were either clothed with the authority of State law, and by virtue of acting under color of such state law did corruptly and wantonly deprive plaintiffs of fundamental rights granted by the Constitution of the United States, as hereinafter alleged, and/or conspired with other named defendants who were not so clothed with authority of State law but, nonetheless,

acted as aforesaid to deprive plaintiffs of their said Constitutional rights to due process of law and equal protection of the laws and freedom from involuntary servitude.

(d) That all of the acts of the defendants in the furtherance as said conspiracy and scheme to deprive the plaintiffs of their liberty and property are hereinafter set forth.

FOURTH: On and about December 7, 1960, Mrs. Stambler purchased all the outstanding corporate stock of Empire Park, Inc., (Empire I) a defunct New York corporation, from Antoinette Gordon and Sadye Schachner, the owners of said stock. Each was paid a valuable consideration.

FIFTH: At no time after December 7, 1960, have the sellers Antoinette Gordon and Sadye Schachner made any demand or claim for the return of said corporate stock nor have either of them made any tender of the consideration paid them, nor has either instituted any action for the rescission of said sale.

SIXTH: At no time has the purchase of the corporate stock of any company been prohibited by any statute of the State of New York, nor has any statute been enacted that the purchase of corporate stock must be approved by any judge of any court.

SEVENTH: Thereafter, Stambler in marshalling the assets of Empire I found those assets to include the strip of land shown in black on the diagram annexed hereto as Exhibit A.

EIGHTH: Through survey, title examination and investigation it was discovered that County Dollar with the active cooperation of Title Guarantee had stolen the parcel of land shown at "C" on Exhibit "A" and concealed that theft through an improper description of the property.

NINTH: Through Finke it was learned that Wasylec was attempting to steal the parcel of land shown at "A" on Exhibit "A" to sell the said parcel to Finke.

TENTH: Wasylec through Avstreih then made an agreement with Stambler to purchase the parcels "A" and "B" on Exhibit "A" for an agreed price of $15,000.00.

ELEVENTH: In pretended compliance with said agreement, Wasylec, Avstreih and Weiss set a time for completion of the sale and closing of title at the offices of Title Guarantee.

TWELFTH: In furtherance of the said conspiracy and scheme the said defendants Wasylec, Avstreih and Weiss completed the purchase of the land and, thereupon, on the same day, commenced an action against the plaintiffs to recover the consideration paid to Prudential, as seller, on the ground that plaintiffs had forced Wasylec to purchase the said land.

THIRTEENTH: Thereafter, in furtherance of the said conspiracy and scheme, Title Guarantee, by an officer Herman Berniker called on Stambler and offered to have the Wasylec action settled and discontinued without cost to the plaintiffs if Stambler would arrange the delivery of a deed

to the land County Dollar and Title Guarantee had stolen shown as Parcel "C" on Exhibit "A".

FOURTEENTH: Upon the refusal of Stambler to arrange for the delivery of the requested deed, and in furtherance of the said conspiracy and scheme, Title Guarantee in the name of County Dollar by O'Malley commenced an action against plaintiff's corporation to have the Court declare that the strip of land did not exist.

FIFTEENTH: Thereafter, in furthorance of said conspiracy and scheme on information and belief Wasylec, Avstreih and Weiss were induced by County Dollar, Title Guarantee and O'Malley to change their calim against plaintiffs from the calim that Wasylec was forced by the plaintiffs to purchase the parcels to the claim that plaintiffs had acted as Wasylec's agents and instead of the land involved being the two parcels purchased by Wasylec, Wasylec, Avstreih and Weiss made claim to the entire strip of land so that County Dollar, Title Guarantee and O'Malley could then increase their claim to include Wasylec.

SIXTEENTH: In furtherance of said conspiracy and scheme, thereafter, on information and belief, Dillon was induced to join and order the two disparate actions to be tried before him at one time.

SEVENTEENTH: Thereafter, a trial was held before Dillon sitting as a justice of the Supreme Court at White Plains, New York, and the other defendants made fraudulent,

false and untrue statements before Dillon and with his encouragement to create a record which would be prolix, confusing and contradictory.

EIGHTEENTH: Despite the testimony and statements of the defendants, Dillon stated in his decision, a copy of which is attached hereto and marked Exhibit "B" that the land existed and that the plaintiffs were not the agents of the defendants or any of them: to wit:

a. As to the existence of the strip of land which defeats the County Dollar claim:

> "Thereafter Finke ordered a title policy from the Title Guarantee Company and its search disclosed a defect in title; to wit, the existence of a gore or strip of land between the filed map of the Pease Estate (Emp. Ex. D) and the revised map of Section 2 of Empire Park #2803 (Emp. Ex. F) The gore ran through the property owned by Wasylec and under contract to Tannenbaum and other property owned by County Dollar Corporation". (Page 1 Exhibit B) (emphasis added)

b. The claim of agency by Wasylec was defeated by this statement by Dillon:-

> "It cannot be said that any fiduciary relationship existed between plaintiff (Wasylec) and Stambler or any of the persons in the Stambler group".
>
> (Page 6, Exhibit B)

NINETEENTH: Thereafter, in furtherance of said conspiracy and scheme and in order to deprive plaintiffs of their liberty and their property for the benefit of the other defendants herein, Dillon, under the color of state law, and without notice to these plaintiffs usurped the powers of his

office, to claim jurisdiction over the sale of the stock by Antoinette Gordon and Sadye Schachner and Dillon so states in his decision, as follows:

> "While it is true that the persons who assigned the stock in Empire Park, Inc., and who executed affidavits to effectuate a conveyance of the gore have not instituted the present action, the court is of the opinion that the doctrine enunciated in the above cited cases should be utilized to protect the interests of those persons who actually sustained damages because of Stambler's wrongful acts". (Page 7 Exhibit B) (Emphasis added)

TWENTIETH: Dillon, thereafter, in furtherance of said conspiracy and scheme, without any formal complaint before him and without the presence of the only two possible plaintiffs, and through the use of Dillon's creative imagination, arrogated to himself the right to charge the plaintiffs, without notice to them with "wrongdoing" and "deceit and fraud" as follows:

> "It is well established that when a person acquires title to property through a scheme of deceit and fraud, as in the instant case, the court will not permit him to retain the fruits of wrong".

TWENTY FIRST: In furtherance of said conspiracy and scheme, Dillon, on the behest of the other defendants arrogated to himself, under color of state law and by virtue of the powers of a Supreme Court Justice, that he, Dillon had the power to approve or disapprove purchases, at arms length between plaintiffs and others who were not parties to any action before him, to wit:

"The Court could not approve of the manner in which title to the gore was acquired by Stambler" (Page 6 Exhibt "B")

TWENTY SECOND: In furtherance of said conspiracy and scheme, Dillon, on the behest of the other defendants, arrogated to himself, under color of State law and the office of Justice of the Supreme Court, the right to hold plaintiffs in involuntary servitude, and to restrict their liberty without any basis in law for the benefit of the other defendants herein as is shown by the following statement of Dillon:

"It is the court's opinion that once Stambler was advised that Finke would not pay him for his service, he was not at liberty to strike out on his own". (page 6 Exhibit B) (Emphasis added.)

"Stambler and his associates will be permitted to retain the sum of $3,000.00 to defray expenses and to compensate Stambler for the fair and reasonable value of the services which he rendered." (page 9 Exhibit B) (Emphasis added)

This holding of the plaintiffs in involuntary servitude is without the showing that any employment of the plaintiffs was ever agreed to by the plaintiffs.

TWENTY THIRD: In furtherance of said conspiracy and scheme, Dillon, at the behest of the other defendants, in order to deceive any appellate or reviewing court and to hide his own acts assisting the theft of the property from the plaintiffs and their corporations, defamed and maligned and attainted plaintiffs, using other false and misleading statements and knowing them to be false and misleading and thereby denied them due process of law, a fair and im-

partial trial and equal protection of the law.

TWENTY FOURTH: In furtherance of said conspiracy and scheme, Dillon, at the behest of the other defendants under color of state law and the powers of a Supreme Court Justice, arrogated to himself the right to impair the obligation of the contract between Wasylec and Stambler's corporation, Prudential.

TWENTY FIFTH: The defendants by their acts described above did deprive the plaintiffs of their liberty and property, deny them due process and equal protection of the law and threaten to inflict further injury and damage to the plaintiffs unless restrained by an order of this Court in violation of their legal rights, for which the plaintiffs have no adequate remedy at law.

WHEREFORE, the plaintiffs pray:

1. That this Court render judgment declaring that the defendants acted in concert to deprive the plaintiffs of their liberty and property and to deny them due process and the equal protection of the law in violation of their rights pursuant to the Constitution of the United States and in particular Article I, Section 10, and the Fifth, Thirteenth and Fourteenth Amendments thereto and in violation of United States Statutes 42 U.S.C. 1981, 1982, 1983, 1985 and 1994.

2. That this Court render judgment declaring that the judgment granted by the defendant Dillon on April 22, 1965 in the actions in Westchester County, New York, entitled

Wasylec v. Stambler, Prudential v Wasylec and County Dollar v Empire Park was based on subject matter over which the defendant Dillon lacked jurisdiction and knew he lacked jurisdiction and is therefore null and void and all acts taken pursuant to said judgment are null and void and

3. That a permanent injunction issue restraining defendants, their agents, attorneys and all persons acting in concert with them or through them from the enforcement, operation or execution of the judgment of the Supreme Court, Westchester County entered April 22nd, 1965 in the actions Wasylec v Stambler, Prudential v Wasylec and County Dollar v Empire Park, Inc., and

4. Restraining defendants, their agents, attorneys, and all persons acting in concert with them or through them from impeding, intimidating, hindering and preventing the plaintiffs from exercising the rights, privileges and immunities guaranteed to them by the Constitution and Laws of the United States, and

5. That plaintiffs be awarded damages in the amount of $500,000.00 and such other lawful damages as the Court may find due, including exemplary and punitive damages, excepting from the claim for damages defendant John J. Dillon.

That the plaintiffs be granted such other, further and different relief as the Court may find appropriate to protect their rights.

SAUL STAMBLER
ROSE STAMBLER
Plaintiffs Pro Se
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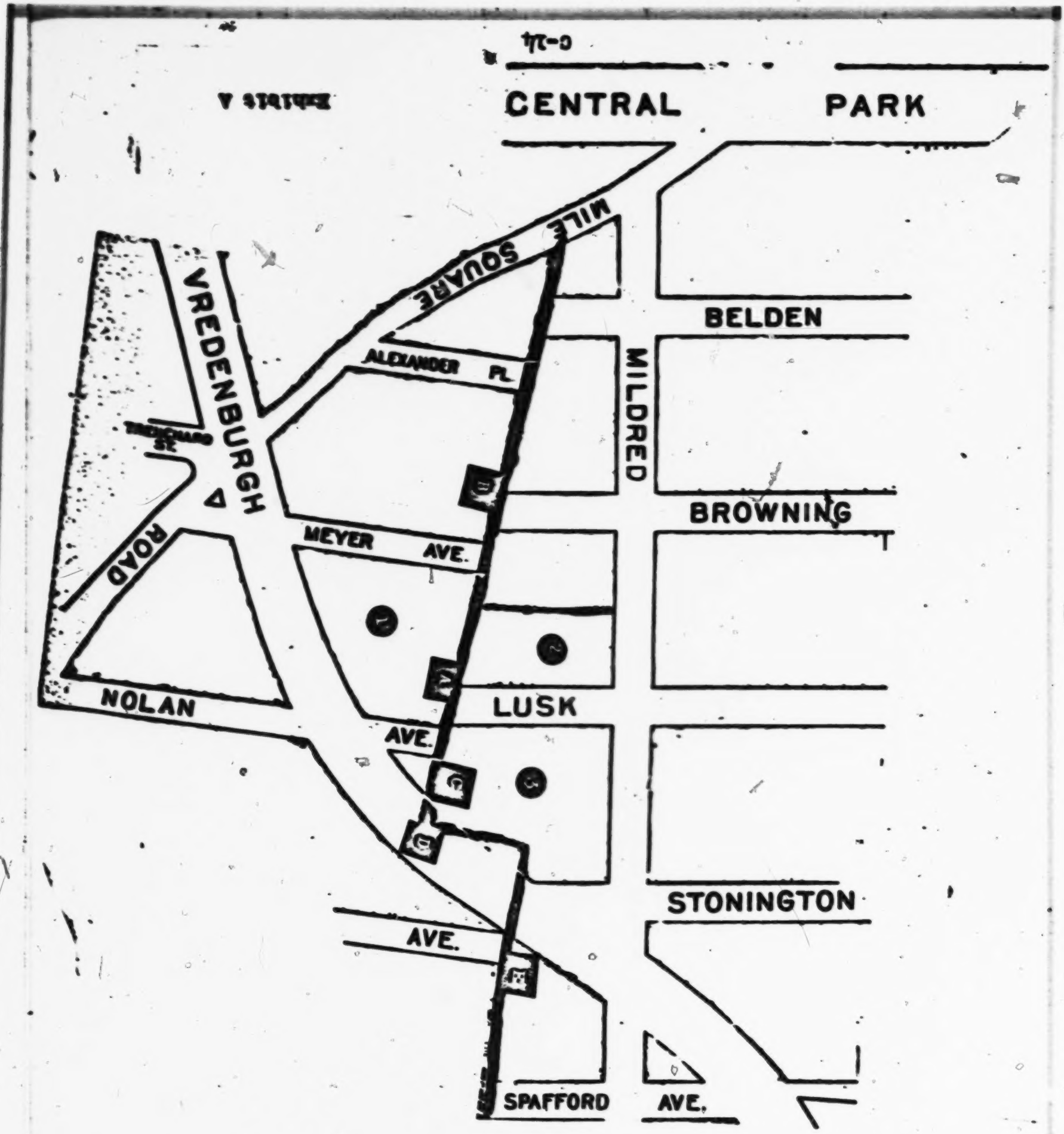
CENTRAL
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ROAD
NOLAN
AVE.
LUSK
STONINGTON
AVE.
SPAFFORD
AVE.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

SAME TITLE

DILLON, J.

THREE consolidated actions arising out of or relating to the question of title to a strip of land located in the City of Yonkers were tried before the court without a jury. From the evidence submitted the court finds the following state of facts.

ON April 20, 1960, Peter Wasylec entered into a contract to sell a vacant and undeveloped parcel of real property in the City of Yonkers to Herbert Tannenbaum for the sum of $130,000. The contract was conditioned upon the rezoning of the property and upon the vendee "executing a lease with a national chain store." The contract vendee was represented by an attorney named Marcy Fink. Fink hired one Jack Jacobs, who was president and sole stockholder of Prudential Abstract Co., Inc. and Prudential Operating Co., Inc., to conduct a title search of the property. Jacobs submitted a report to Fink which disclosed that the property was subject to certain restrictive covenants. The Metropolitan Title Co. refused to issue a title policy insuring against the enforceability of the covenants. Thereafter Fink ordered a title policy from the Title Guarantee Company and its search disclosed a defect in title; to wit, the existence of a gore or strip of land between the filed map of the Pease Estate (Emp. Ex. D) and the revised map of Section 2 of Empire Park #2803 (Emp. Ex. F). The gore ran through the property owned by Wasylec and under contract to Tannenbaum and other property owned by County Dollar Corporation. Both parcels of property had been acquired by the City of Yonkers through in rem tax lien foreclosure

sale and judgment, and there is an issue as to whether the judgment extinguished all rights of former owners in and to the properties, including the alleged gore.

IN any event, when the question of the gore was raised by the report of The Title Guarantee Company in August of 1960, Fink advised Wasylec of the problem and Wasylec stated that he would straighten it out. Wasylec then obtained a quit claim deed to the gore from the survivors of the deceased owner of all but the organizational stock of Empire Park, Inc., the former owner. The Title Guarantee Company considered this deed insufficient to overcome its objection to title. By this time, Fink himself had become a principal in the contract of purchase. In November of 1960, Fink spoke to Jacobs about clearing up the cloud on title, and Jacobs recommended to Fink one Saul Stambler as a man experienced in this field and capable of resolving the problems.

Fink met with Stambler on November 15, 1960, and informed him of the details relating to the cloud on title. Fink testified that he never hired Stambler, but that he recommended Stambler to Wasylec's attorney. Stambler testified that Fink directed him to go out and acquire title to the gore and then offer it for sale to either him or to Wasylec. On December 7, 1960, Stambler advised Fink that he had the situation under control. At this juncture it should be noted that the Title Guarantee Company by letter dated September 8, 1960, addressed to Fink, had advised him that title to the gore or strip of land was vested in Empire Park, Inc. under a deed from Ann N. Sawyer dated November 14, 1924, and that Empire Park Inc. had been dissolved in 1938. Stambler was furnished with all the available information including the fact that the former president of the corporation had

died, survived by a spouse and a son. Stambler communicated with the son, George Byron Gordon, and represented himself to be an officer of a title company which had been hired by Wasylec to clear the title to Wasylec's property. In order to accomplish this Stambler stated that it would be necessary for Gordon and his mother to execute certain documents. Under cover of a letter dated November 30, 1960, on the stationery of Prudential Abstract Co., Inc., Stambler forwarded three instruments to Gordon, an affidavit to be executed by Gordon, and an affidavit and assignment of Empire Park, Inc. stock to be executed by Gordon's mother, Antoinette K. Gordon. The assignment ran from Antoinette K. Gordon to Rose Stambler and when Gordon inquired why the assignment ran to Rose Stambler, he was told by Stambler that it was just a matter of convenience. These documents were executed and forwarded to Stambler. Stambler admitted that at that time he was neither an officer nor employee of Prudential Abstract Co., Inc. and that he was not acting on its behalf. He explained that its stationery was in the office he was using at the time and that he had no stationery of his own. The court has drawn its own conclusion as to Stambler's motive in using the Prudential stationery - the use of such stationery was not merely a matter of convenience or coincidence, as Stambler would have the court believe, but was a part of an overall scheme devised by Stambler to obtain record title to the disputed gore. The use of such stationery was consonant with his prior representation that he was acting on behalf of a title company employed by Wasylec to solve the problems in connection with his property. George Byron Gordon testified that except for the misrepresentations which were believed to be true, he would not have executed the affidavit, nor would he have advised his mother to execute the affidavit and assignment of stock.

Stambler also obtained an affidavit and assignment of stock from one Sadie Schachner. That affidavit, as well as the one from Antoinette K. Gordon, states that it and the stock assignment were made in order "to aid interested parties to sure defects in title to lands formerly owned by Empire Park, Inc." Under no circumstances is the court able to construe the term "interested parties" as an expression of intention to aid and asssist Saul Stambler in obtaining title to the gore. While it is true that Stambler paid Antoinette K. Gordon $750. in consideration for the assignment of her stock interest in Empire Park, Inc., the court is not satisfied that the mere payment of money under the circumstances of this case is sufficient to vest Stambler and/or his assignees with absolute and unencumbered title to the stock.

ON December 31, 1960, Rose Stambler, as "sole surviving director" of Empire Park, Inc. executed a quitclaim deed which purported to convey the gore to Prudential Operating Co., Inc. At this juncture, Wasylec was unable to convey title to the property in accordance with the contract which provided that "seller shall give and purchaser shall accept a title such as any approved title company will approve and insure." In order to satisfy the title company it was necessary for Wasylec to obtain record title to the gore. Wasylec was also being sued by the real estate broker who had negotiated the sale for $6,500. in commissions.

UNDER these circumstances Wasylec agreed with Stambler to pay $15,000 for a conveyance of that portion of the gore which ran through the Wasylec property. A title closing was held on June 26, 1961, at which Prudential Operating Co., Inc. conveyed the necessary portion of the gore to Wasylec for $15,000., and Wasylec simultaneously conveyed his property to

the assignees of Tannenbaum in accordance with the contract of April 20, 1960. As Stambler was leaving the closing he was served with process in the present action initiated by Wasylec.

ACTION No. 1 was commenced by Wasylec against Stambler, his wife, Jacobs, Prudential Operating Co., and the Empire Park corporations, all of which are hereinafter referred to as the Stambler group; in addition, Fink, Tannenbaum, and all of the persons who were interested in the purchase of the Wasylec property are also named as party defendants and they are hereinafter referred to as the Fink group. As against the Stambler group Wasylec seeks recovery of the $15,000. paid for the conveyance of a portion of the gore. He also asks that the court impress an equitable or constructive trust in favor of Wasylec on the remainder of the gore (the portion running through County Dollar's property.)

ACTION No. 2 was commenced by Prudential Operating Co., Inc. against Wasylec and all parties presently interested in the Wasylec property (owners, mortgagees and tenant) and seeks to set aside the conveyance of the gore on the theory of fraud; to wit, that Wasylec had formed the intention to commence an action for the recovery of the purchase price of a portion of the gore prior to the time of its conveyance to him. It is also urged that there was no consideration to support the conveyance. Prudential also seeks recovery of punitive damages in the amount of $100,000. This action was discontinued at the beginning of the trial against all of the defendants except Wasylec and Cross-Thru Corporation.

Action No. 3 was commenced by County Dollar Corporation pursuant to Article 15 of the Real Property Actions and Proceedings Law and seeks judgment against Empire Park, Inc. and Wasylec barring them from

any and all claims to the County Dollar property and determining that County Dollar is vested with absolute title to the property.

The court determines that the proof in Action No. 1 is insufficient to support any of the allegations of fraud and wrongdoing on the part of either Jacobs or Fink or any of the persons in the Fink group. Accordingly, all these defendants are entitled to judgment dismissing the complaint as against them without costs. It cannot be said that any fiduciary relationship existed between the plaintiff and Stambler or any of the persons in the Stambler group. However, in the court's opinion the existence of a fiduciary relationship in and of itself is not the key question to be resolved in determining the liability, if any, of Stambler or the members of his group. Even if Stambler's version and interpretation of the conversations had with Fink relating to the gore were accepted as true, the court could not approve of the manner in which title to the gore was acquired by Stambler, Whether Stambler formed the intent to acquire title to the gore for himself at the very inception of his introduction to the transaction, or whether he only formed such intent after Finke refused to pay him "disbursements" of $1,500., is not the controlling feature of this case. It is the court's opinion that once Stambler was advised that Fink would not pay him for his services, he was not at liberty to strike out on his own. At this juncture, and if his version of the story is accepted as true, he would have been in a position to seek recovery of his disbursements and the fair and reasonable value of his services to date from Fink. He also could have ascertained whether Wasylec wished to retain him. However, the proof is clear that Stambler did not approach Wasylec until after he had acquired title to the gore. The three persons who were instrumental in effectating the conveyance all executed

affidavits, referred to in an earlier portion of the decision, which on their face establish that the motivation for the conveyance was "to aid the interested parties to sure defects in title to lands formerly owned by Empire Park, Inc." (emphasis added). Under all the evidence, including Stambler's letter to George Byron Gordon on the stationery of Prudential Abstract Co., Inc., the words "interested parties" are capable of only one interpretation. "Interested parties" could only mean the parties who had record title to the main parcels of property through which the gore was alleged to exist. It is well established that when a person acquires title to property through a scheme of deceit and fraud, as in the instant case, the court will not permit him to retain the fruits of the wrong, but will impress a constructive trust upon the property in favor of those who in good conscience are entitled to the property (Frier v. J. W. Sales Corp. 261 App. Div. 388, 391). In 319 East 72nd Street Corporation v. George W. Warnecke & Co., Inc. (20 A D 2d 513, app. damd. 13 N Y 2d 1126), the court impressed a constructive trust in favor of the plaintiffs stating:

> "Deceit, it is plain, corrupted Warnecke's course from the outset. * * * * * * * * *
> He was aware that plaintiffs would not have sold to him or to anyone on the terms they did, had they known the truth * * * * * *."

While it is true that the persons who assigned the stock in Empire Park, Inc. and who executed affidavits to effectuate a conveyance of the gore have not instituted the present action, the court is of the opinion that the doctrine enunciated in the above cited cases should be utilized to protect the interests of those persons who actually sustained damages because of Stambler's wrongful acts.

DECISION

Bron v. Weintraub, 42 N. J. 87, is an instructive case. There the highest court of New Jersey was confronted with a comparable problem arising out of a defect in title to real property resulting from the failure to join the heirs of one Harry Weintraub, who had died intestate in 1933, in a tax lien foreclosure sale conducted in 1940. At the time of the sale in 1940, the land was vacant, but when the defect in title was discovered in 1959 homes had been erected on the land and sold to bona fide purchasers. In order to clear title to the property, the municipality commenced a proceeding to bar the Weintraub interests and notice of such proceeding was served on the Weintraub heirs by publication. An individual having more enterprise than conscience thereby learned of the situation. He ascertained the identity and whereabouts of the Weintraub heirs and communicated with them by letter, stating that the 1940 foreclosure action was "possibly defective" and that they "might claim an interest" in the property. The letter made inquiry as to whether the "possible claim" would be released for a "courtesy consideration," of $50. The heirs executed quitclaim deeds upon payment of the "courtesy consideration." The homeowners commenced an action to quiet title and cut off the interests which had thus been obtained from the Weintraub heirs. The court in referring to the letter written to the heirs characterized it as "palpably deceptive," because "it would permit an inference that Harvey led the Weintraub heirs to believe he was acting for the householders, and upon such a finding a constructive trust could be imposed in their favor." The court, however, predicated its decision on the theory of public policy, holding that the policy of the courts is to support tax sales and thereby "aid municipalities in raising revenue." The opinion makes reference to public policy as "reflecting the common conscience" and

points out that it "changes in its demands with the needs and the widely held feelings of the times." The court concluded that the acquisition of title from the Weintraub heirs by a third party was without "social value or contribution" and that (page 95) "decent men must sense only revulsion in this traffic in the misfortunes of others." The court in reaching its determination to impress a constructive trust in favor of the plaintiffs, relied upon the New York case of Latham v. Father Divine, (299 N.Y. 22, 27) in which it was held that the concept of a constructive trust "is limited only by the inventiveness of men who find new ways to enrich themselves unjustly by grasping what should not belong to them."

The court determines that it would be grossly unfair and contrary to public policy to permit Stambler and his associates to retain the unconscionable consideration exacted from Wasylec at a time when he was under contract to convey marketable title and when he knew that his default could and probably would result in claims against him by the broker as well as by the prospective purchasers. Stambler and his associates will be permitted to retain the sum of $3,000. to defray expenses and to compensate Stambler for the fair and reasonable value of the services which he rendered. The plaintiff Wasylec is awarded a judgment of $12,000., with interest from June 26, 1961, and costs, against Saul Stambler, Rose Stambler, both of the Empire Park corporations and Prudential Operating Co., Inc. To hold otherwise would be contrary to the time-honored maxim that no one should be permitted to profit by his own wrongful act (Riggs v. Palmer, 115 N. Y. 506).

Action No. 2 is dismissed with costs. The plaintiff in Action No. 3 is granted judgment without cost determining it to be the sole owner

DECISION

in fee simple of the property described in the complaint and barring the defendants from any interest therein, and the cross-claims and counter-claims in Action No. 3 are dismissed without costs.

Submit judgment on notice.

Dated: White Plains, New York
April 9, 1958

John J. Dillon
J. S. C.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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SAUL STAMBLER and ROSE STAMBLER individually and SAUL STAMBLER on behalf of PRUDENTIAL OPERATING CO., INC., and EMPIRE PARK, INC. and ROSE STAMBLER on behalf of EMPIRE PARK, INC. (a defunct corporation),

Plaintiffs,

68 CIVIL 537

-against-

AMENDED ANSWER

JOHN J. DILLON, TITLE GUARANTEE CO., COUNTY DOLLAR CORPORATION, JOHN C. O'HALLEY, PETER WASYLEC, DAVID AVSTREIH, LEONARD WEISS, NANCY FINKE, GEORGE B. GORDON,

Defendants.

----------x

Defendant, PETER WASYLEC, appears specially herein, and for his amended answer to phintiffs' amended complaint respectfully shows to the Court and alleges:

FIRST: Denies each and every allegation contained in the paragraphs of the plaintiffs' complaint designated FIRST, NINTH, TENTH (page 5 of the complaint), ELEVENTH, TWELFTH, THIRTEENTH, FOURTEENTH, FIFTEENTH (page 6 of the complaint), SIXTEENTH, SEVENTEENTH (page 7 of the complaint), TWENTY-FOURTH (page 9 of the complaint) and TWENTY-FIFTH (page 10 of the complaint).

SECOND: Denies that he has any knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph SECOND (a), subparagraphs 1 and 2 (page 2 of the complaint), except admits upon informa-

tion and belief that Saul Stambler and Rose Stambler are residents of the City of Yonkers, County of Westchester and State of New York.

THIRD: Denies knowledge or information sufficient to form a belief as to the allegations contained in paragraph SECOND (b), subparagraphs 1 (page 2 of the complaint) except admits that the defendant, John J. Dillon, is a resident of the State of New York and a Justice of the Supreme Court of the State of New York.

FOURTH: Denies knowledge or information sufficient to form a belief as to the allegations contained in paragraph SECOND (b), subparagraph 2 (page 3 of the complaint), except admits that the defendant, Title Guarantee Co., among other things, examines records of real property titles,certifies the ownership and insures the title to real property.

FIFTH: Denies knowledge or information sufficient to form a belief as to the allegations contained in paragraph SECOND (b), subparagraph 3 (page 3 of the complaint).

SIXTH: Denies each and every allegation contained in paragraph THIRD (a) (page 3 of the complaint), THIRD (b) (page 4 of the complaint), THIRD (c) (page 4 of the complaint), and THIRD (d) (page 4 of the complaint).

SEVENTH: Denies each and every allegation contained in the paragraphs of the complaint designated FOURTH, FIFTH, SEVENTH, EIGHTH (page 5 of the complaint), EIGHTEENTH (page 7 of the complaint), NINTEENTH, TWENTIETH, TWENTY-FIRST (page 8 of the complaint), TWENTY-SECOND and TWENTY-THIRD (page 9 of

the complaint), and respectfully refers this Court to the decision of Mr. Justice John J. Dillon rendered on April 9th 1965 after a trial of three consolidated actions, a copy of which decision is annexed to the original complaint.

EIGHTH: Denies knowledge or information sufficient to form a belief as to the allegations contained in paragraph SIXTH (page 5 of the complaint).

FIRST DEFENSE

NINTH: That this Court has not jurisdiction of the cause of action set forth in the complaint herein; that at the time of the commencement of this action, the individual plaintiffs, Saul Stambler and Rose Stambler, were residents of the City of Yonkers, County of Westchester and State of New York, and citizens of the State of New York, and the plaintiff corporations were and still are New York corporations; that all of the defendants are either New York corporations or citizens of the State of New York except the defendant, George B. Gordon, a purported citizen of the State of New Jersey; that by reason of the foregoing, this Court has not jurisdiction of the subject matter of this action on the ground of diversity of citizenship, or on any other of the grounds alleged in paragraph FIRST of the complaint.

SECOND DEFENSE

TENTH: That this Court has not jurisdiction over the persons enumerated as plaintiffs and defendants herein.

THIRD DEFENSE

ELEVENTH: That this is an action to restrain the enforcement, vacate, set aside and declare a nullity, a final

judgment of the Supreme Court of the State of New York, County of Westchester, duly entered against the plaintiffs on April 22nd 1965, after trial in the consolidated action entitled as set forth in Exhibit 1 as annexed to the original answer, pursuant to decision of Mr. Justice John J. Dillon rendered on April 9th 1965, a copy of which decision is annexed to the complaint, which judgment was unanimously affirmed on the appeal by plaintiffs herein to the Appellate Division of the Supreme Court, Second Judicial Department by its order entered on June 12th, 1967. The appeal from said judgment of affirmance to the Court of Appeals taken on constitutional grounds was dismissed by order of the Court of Appeals dated November 2nd 1967 "upon the ground that no constitutional question is involved". No application for certiorari was made to the Supreme Court of the United States and the time to make such application has expired. Therefore, this Court does not have jurisdiction of the subject matter of this action and said judgment is res adjudicata of the purported issues in this action, and this Court does not have jurisdiction to stay, vacate, modify, annul or set aside said judgment on any of the grounds urged in the complaint herein.

FOURTH DEFENSE

TWELFTH: The complaint fails to state a claim against these defendants upon which relief can be granted.

WHEREFORE, defendant, PETER WASYLEC, demands judgment dismissing the complaint of the plaintiffs herein, together with the costs and disbursements of this action.

AVSTREIH, MARTINO & WEISS

Attorneys for Defendant,
Peter Wasylec
Office & P.O. Address
20 East First Street
Mount Vernon, New York

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

SAUL STAMBLER and ROSE STAMBLER individually and SAUL STAMBLER on behalf of PRUDENTIAL OPERATING CO., INC., and EMPIRE PARK, INC. and ROSE STAMBLER on behalf od EMPIRE PARK, INC. (a defunct corporation),

Plaintiffs,

68 CIVIL 537

-against-

AMENDED ANSWER

JOHN J. DILLON, TITLE GUARANTEE CO., COUNTY DOLLAR CORPORATION, JOHN C. O'MALLEY, PETER WASYLEC, DAVID AVSTREIH, LEONARD WEISS, MARCY FINKE, GEORGE B. GORDON,

Defendants.

----------X

Defendants, DAVID AVSTREIH and LEONARD WEISS, appear specially herein, for their amended answer to plaintiffs' amended complaint, respectfully show to the Court and allege:

FIRST: Deny each and every allegation contained in the paragraphs of the plaintiffs' complaint designated FIRST, NINTH, TENTH (page 5 of the complaint), ELEVENTH, TWELFTH, THIRTEENTH, FOURTEENTH, FIFTEENTH (page 6 of the complaint), SIXTEENTH, SEVENTEENTH (page 7 of the complaint), TWENTY-FOURTH (page 9 of the complaint), and TWENTY-FIFTH (page 10 of the complaint).

SECOND: Deny that they have any knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph SECOND (a), subparagraphs 1 and 2 (page 2 of the complaint), except admit upon informa-

tion and belief that Saul Stambler and Rose Stambler are residents of the City of Yonkers, County of Westchester and State of New York.

THIRD: Deny knowledge or information sufficient to form a belief as to the allegations contained in paragraph SECOND (b), subparagraphs 1 (page 2 of the complaint) except admit that the defendant, John J. Dillon, is a resident of the State of New York and a Justice of the Supreme Court of the State of New York.

FOURTH: Deny knowledge or information sufficient to form a belief as to the allegations contained in paragraph SECOND (b), subparagraph 2 (page 3 of the complaint), except admit that the defendant, Title Guarantee Co., among other things, examines records of real property titles, certifies the ownership and insures the title to real property.

FIFTH: Deny knowledge or information sufficient to form a belief as to the allegations contained in paragraph SECOND (b), subparagraph 3 (page 3 of the complaint).

SIXTH: Deny each and every allegation contained in paragraph THIRD (a) (page 3 of the complaint), THIRD (b) (page 4 of the complaint), THIRD (c) (page 4 of the complaint), and THIRD (d) (page 4 of the complaint).

SEVENTH: Deny each and every allegation contained in the paragraphs of the complaint designated FOURTH, FIFTH, SEVENTH, EIGHTH (page 5 of the complaint), EIGHTEENTH (page 7 of the complaint), NINETEENTH, TWENTIETH, TWENTY-FIRST (page 8 of the complaint), TWENTY-SECOND and TWENTY-THIRD (page 9 of the complaint), and respectfully refer this Court to the

decision of Mr. Justice John J. Dillon rendered on April 9th 1965 after a trial of three consolidated actions, a copy of which decision is annexed to the original complaint.

EIGHTH: Deny knowledge or information sufficient to form a belief as to the allegations contained in paragraph SIXTH (page 5 of the complaint).

FIRST DEFENSE

NINTH: That this Court has not jurisdiction of the cause of action set forth in the complaint herein; that at the time of the commencement of this action, the individual plaintiffs, Saul Stambler and Rose Stambler, were residents of the City of Yonkers, County of Westchester and State of New York, and citizens of the State of New York, and the plaintiff corporations were and still are New York corporations; that all of the defendants are either New York corporations or citizens of the State of New York except the defendant, George B. Gordon, a purported citizen of the State of New Jersey; that by reason of the foregoing, this Court has not jurisdiction of the subject matter of this action on the ground of diversity of citizenship, or on any other of the grounds alleged in paragraph FIRST of the complaint.

SECOND DEFENSE

TENTH: That this Court has not jurisdiction over the persons enumerated as plaintiffs and defendants herein.

THIRD DEFENSE

ELEVENTH: That this is an action to restrain the enforcement, vacate, set aside and declare a nullity, a final judgment of the Supreme Court of the State of New York, County

of Westchester, duly entered against the plaintiffs on April 22nd 1965, after trial in the consolidated action entitled as set forth in Exhibit 1 as annexed to the original answer, pursuant to decision of Mr. Justice John J. Dillon rendered on April 9th 1965, a copy of which decision is annexed to the complaint, which judgment was unanimously affirmed on the appeal by plaintiffs herein to the Appellate Division of the Supreme Court, Secnd Judicial Department by its order entered on June 12th 1967. The appeal from said judgment of affirmance to the Court of Appeals taken on constitutional grounds was dismissed by order of the Court of Appeals dated November 2nd 1967 "upon the ground that no constitutional question is involved". No application for certiorari was made to the Supreme Court of the United States and the time to make such application has expired. Therefore, this court does not have jurisdiction of the subject matter of this action and said judgment is res adjudicata of the purported issues in this action, and this Court does not have jurisdiction to stay, vacate, modify, annul or set aside said judgment on any of the grounds urged in the complaint herein.

FOURTH DEFENSE

TWELFTH: The complaint fails to state a claim against these defendants upon which relief can be granted.

WHEREFORE, defendants, DAVID AVSTREIH and LEONARD WEISS, demand judgment dismissing the complaint of the plaintiffs herein, together with the costs and disbursements of this action.

AVSTREIH, MARTINO & WEISS
Attorneys for Defendants.

David Avstreih & Leonard Weiss
Office & P.O. Address
20 East First Street
Mount Vernon, New York

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
- - - - - - - - - - - - - - - - - -x

SAME TITLE

68 Civil Action
No. 537

ANSWER

- - - - - - - - - - - - - - - - - -x

Defendant, HARCY FINKE, answering the complaint of the plaintiffs herein, by his attorneys, FINKE, JACOBS & HIRSCH, respectfully alleges and shows to this Honorable Court as follows:

FIRST: Denies each and every allegation of the first paragraph of paragraph "FIRST" of the complaint, and each and every allegation of the second paragraph of paragraph "FIRST", except admits that one of the alleged purposes of this action is to enjoin certain of the defendants (except this answering defendant) from enforcement and execution of a certain judgment obtained by certain defendants and claimed to be invalid, on the ground of its alleged repugnance to the specified sections of certain Federal statutes and specified amendments to the Constitution of the United States of America, but denies that any plaintiff is entitled to any relief under the claimed statutes.

SECOND: Denies knowledge or information sufficient to form a belief as to each and every allegation contained in paragraph "SECOND" of the complaint, and of each and every subdivision thereof and all remaining paragraphs of the complaint, except ad-

mits that defendant, Marcy Finke, is a citizen of the United States and an attorney-at-law, and has been and is a member of the law firm of Finke, Jacobs & Hirsch, and that John J. O'Malley is an attorney-at-law, and that the Hon. John J. Dillon is a Justice of the Supreme Court of the State of New York, and that the consolidated actions referred to in the complaint were tried before the said Hon. John J. Dillon in the Supreme Court of the State of New York, in and for the County of Westchester, and that after trial the said Hon. John J. Dillon rendered a decision on the merits in said action, and that a judgment in accordance therewith was duly entered in the Office of the Clerk of the County of Westchester, State of New York.

THIRD: Denies each and every allegation contained in paragraph marked "THIRD" and each and every subdivision thereof and paragrphs "TWENTY-FOURTH" and TWENTY-FIFTH".

FOURTH: Denies any knowledge or information as to each and every allegation contained in paragraphs numbered "THIRD" through "SIXTEENTH" inclusive.

FIFTH: Denies each and every allegation contained in paragraph "SEVENTEENTH" of the complaint, except admits that a trial was held before Mr. Justice Dillon.

SIXTH: Denies each and every allegation contained in paragraphs numbered "EIGHTEENTH" through "TWENTY-SECOND" of the complaint herein, and refers to the decision of Mr. Justice Dillon resulting in a judgment against plaintiffs on April 22, 1963, affirmed by the Appellate Division of the State of New York, Second Department, 28 A.D. 2, 825, 822, 824. Appeals therefrom were taken to the Court of Appeals which on November 2, 1967 granted motions to dismiss the appeal. (20 N.Y. 2, 893).

FOR A FIRST, SEPARATE AND COMPLETE AFFIRMATIVE DEFENSE:

SEVENTH: Defendant alleges that heretofore, plaintiffs and defendants, Peter Wasylec, Marcy Finke and other persons and corporations, were parties plaintiffs and defendants in a civil action which was tried in the Supreme Court of the State of New York, at Special Term, Part II of the Equity Term of that Court, held at the County Courthouse in the City of White Plains, County of Westchester, State of New York, on the 1st, 2nd, 5th, 6th and 7th days of October, 1964; that, at the conclusion of the said trial, a judgment was made and duly signed on the 22nd day of April, 1965 by Hon. John J. Dillon, before whom the said case had been tried, and said judgment was duly entered in the Office of the County Clerk of the County of Westchester.

ANSWER

EIGHTH: That the aforesaid action arose out of, or relating to, the question of title to a strip of land located in the City of Yonkers, and that the various plaintiffs and defendants in the said actions, as consolidated by an order of the Supreme Court, in and for the County of Westchester, made various claims, alleging conspiratorial tort, civil fraud, breach of fuduciary obligations, claims to parts of a gore or strip of land, and damages, both compensatory and punitive in character.

NINTH: That all of the parties to the aforesaid action were represented by attorneys of their own choosing, testified on behalf of their respective claims, and were duly cross-examined; that the said trial was conducted in accordance with the procedure prevailing in the State of New York with respect to the trial of civil actions, and that evidence was submitted by the respective parties in accordance with the rules of evidence obtaining with respect to trials of civil actions.

TENTH: That before the commencement of the aforesaid trial, the attorney for Prudential Operating Co., Inc., one of the plaintiffs herein, requested of the defendant, Marcy Finke, permission to discontinue that action without costs, and the said Marcy Finke,

on behalf of himself and his co-defendants named in said action, granted permission for such discontinuance, and the Court, in its judgment, at the conclusion of the trial, dismissed said action of Prudential Operating Co., Inc. as against Marcy Finke and his co-defendants, without costs, and later dismissed the action of Prudential Operating Co., Inc. upon the merits as against the remaining defendants, Peter Wasylec and Cross-Thru Corporation, together with the costs and disbursements of said action.

ELEVENTH: That the remaining actions, consolidated as aforesaid, proceeded thereafter until the conclusion of trial and the entry of judgment; that in the course of said trial, no criminal charge was made or lodged against the plaintiffs herein, and no question was raised by the plaintiffs herein during the course of the trial as to the violation of any of the rights of the plaintiffs in contravention of the Federal statutes mentioned in paragraph "FIRST" of the complaint in this action, or of the various amendments of the Constitution of the United States, also specified in the said first paragraph of the complaint herein.

TWELFTH: That thereafter, the plaintiffs herein appealed from the said judgment to the Appellate

Division of the Supreme Court, Second Department, State of New York, and that after many delays by the plaintiffs herein, the said appeal was fully argued on their behalf by Rene H. Karsten, Esq. who appeared as the attorney for the plaintiffs in this action. Briefs were submitted on behalf of the plaintiffs herein, who were appellants in the said State Supreme Court action, and after passage of a considerable period of time, the Appellate Division of the Second Department unanimously upheld the judgment of defendant, the Hon. John J. Dillon aforesaid.

THIRTEENTH: That thereafter, plaintiffs herein, by the said Rene H. Karsten, Esq., filed a Notice of Appeal in the Court of Appeals, which is the Court of last resort in the State of New York, from the said unanimous affirmance of the Appellate Division, Second Department, claiming the existence of a constitutional question. That thereafter, the Court of Appeals of the State of New York made an order dismissing the said appeal on the ground of the nonexistence of any consitutional question.

FOURTEENTH: That, by reason of the foregoing, there is no controversy of a justifiable nature now before this Court, and that the complaint herein is a transparent attempt to have this Court review the actions of the Courts of the State of New York under

the guise of a spurious claim that Federal statutes specified in paragraph "FIRST" of the complaint and certain amendments of the Consitution of the United States of America have been violated, to the detriment of plaintiffs, by the Hon. John J. Dillon, Justice of the Supreme Court of the State of New York, the Appellate Division of that State, and the Court of Appeals thereof.

FIFTEENTH: That the plaintiffs herein have not been denied the benefit of due process in the trial of the aforesaid action in the State of New York, and now come before this Honorable Court without any warrant or justification in fact or in law, except for the purpose of harassing the defendants herein and forcing them to pay monies to which plaintiffs are not entitled, by instituting a vexatious and costly lawsuit.

AS A SECOND, SEPARATE AND COMPLETE DEFENSE:

SIXTEENTH: Defendant alleges that all relevant issues of fact and law which would properly be cognizable by this Court, if it had jurisdiction, have already been fully and fairly tried in the Court of the State of New York, and that the judgment rendered therein is now res adjudicata.

ANSWER

AS A THIRD, SEPARATE AND COMPLETE AFFIRMATIVE DEFENSE:

SEVENTEENTH: Defendant alleges that this Court has no jurisdiction under Sec. 1331 of Title 28, U.S.C., in that this action does not arise under the Constitution, laws or treaties of the United States; nor has this Court jurisdiction because of the absence of the requisite complete diversity of citizenship under Sec. 1332 of Title 28 of U.S.C., since all parties except defendant, Gordon, are citizens of the State of New York; nor does this Court have jurisdiction under Sec. 1343 of Title 28, which relates to Civil Rights and Elective Franchise; nor does this Court have jurisdiction of this case under Sec. 1981 of Title 42. U.S.C., which relates to Equal Rights under the Law; nor does it have jurisdiction under Sec. 1982, which relates to Property Rights of Citizens; nor under Sec. 1983, which relates to Civil Action for Deprivation of Rights; nor under Sec. 1985, which relates to Conspiracy to Interfere with Civil Rights - Preventing an Officer from Performing Duties; nor under Sec. 1986, which relates to the same subject matter entitled "Action for Neglect to Prevent"; nor under Sec. 1994, entitled "Peonage

Abolished"; nor under Sections 2201 and 2202 of said Title 42, U.S.C. which relate to Authority and Powers of the Atomic Energy Commission. Further, as the complaint on its face shows, there was no violation of the Fifth, Sixth, Seventh, Eighth, Thirteenth and Fourteenth Amendments to the Constitution of the United States, and further, this Court has no jurisdiction of this action by reason of the lack of any presentation of facts in the complaint specifying wherein any or all such amendments were disregarded or violated in violation of the rights of plaintiffs herein.

AS A FOURTH, SEPARATE AND DISTINCT AFFIRMATIVE DEFENSE:

EIGHTEENTH: Defendant alleges that the charges of a conspiracy by and among the defendants herein, including a Justice of the Supreme Court of the State of New York, to try and convict plaintiffs of a non-existent crime entitled by the Penal Law Articel 96, "Fraud and Deceit", of the State of New York(which reads: "Frauds and Cheats"); that plaintiffs were pursuant thereto convicted, and stripped of their property, and interdicted and prevented from pursuing their customary calling or occupation; that the defendants knowingly and wilfully committed crimes against the plaintiffs

herein by allegedly violating and breaking the laws and Constitution of the State of New York, and the laws and Constitution of the United States of America; that defendants, as a result of said alleged actions of the defendants herein, caused incalculable damage to the plaintiffs herein - that all such charges are not only scandalous and indecent under Rule 11 of the Rules of Civil Procedure for the United States District Courts, but are wilfully and shamelessly defamatory and libelous in character and totally lacking in any claim to privilege under the laws and decisions of the Courts of the United States, and should be stricken from the records of this Court with appropriate directions to the Clerk of this Court to take such action.

AS A FIFTH, SEPARATE AND DISTINCT COMPLETE DEFENSE:

NINETEENTH: That the complaint herein fails to state a claim for relief.

WHEREFORE, defendant, Marcy Finke, demands judgment dismissing the complaint herein, and the striking of the same from the records of this Court, together with the costs and disbursement of this action.

ANSWER

FINKE, JACOBS & HIRSCH

By: _____
A Member of the Firm

Attorneys for Defendant, FINKE
Office & P.O. Address
393 Seventh Avenue
New York, N. Y. 10001
Tel: BR. 9-4600

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
- - - - - - - - - - - - - - - - -x

SAME TITLE

ANSWER TO AMENDED COMPLAINT

- - - - - - - - - - - - - - - - -x

Defendants, The Title Guarantee Company, John C. O'Malley and County Dollar Corporation, for their answer to plaintiffs' amended complaint respectfully show to the court and allege:

FIRST: The Title Guarantee Company, John C. O'Malley and County Dollar Corporation, appear specially herein for the purpose of respectfully objecting to the jurisdiction of this Court on the grounds:

1. That the allegations of the amended complaint show that this is nothing more than an action to restrain the enforcement, vacate, set aside, review and declare a nullity, a final judgment of the Supreme Court of the State of New York, County of Westchester, duly entered against the plaintiffs on April 22, 1965 after trial in the consolidated action entitled as set forth in Exhibit "1" hereto annexed which judgment was unanimously affirmed on the appeal by plaintiffs herein to the Appellate Division of the Supreme Court, Second Judicial Department by its Order entered on June 12, 1967. The appeal from said judgment of affirmance to the Court of Appeals taken on constitutional grounds

was dismissed by order of the Court of Appeals dated November 2, 1967 "upon the ground that no constitutional question is involved". No application for certiorari was made to the Supreme Court of the United States and the time to make such application has expired. Therefore, this Court does not have jurisdiction of the subject matter of this action and said judgment is res adjudicata of the purported issues in this action, and this Court does not have jurisdication to stay, vacate, modify, annul or set aside said judgment on any of the grounds urged in the complaint herein.

2. That this action is brought in this Court by plaintiffs, New York corporations and citizens of the State of New York against defendants, all of whom are either New York corporations or citizens of the State of New York except the defendant, George B. Gordon, a purported citizen of the State of New Jersey, for the relief referred to in paragraph "1" above and for $500,000 damages for a purported wrongful conspiracy against plaintiffs arising out of the actions referred to in Exhibit I hereto annexed and the judgment and appeals therein. That by reason of the foregoing this Court has no jurisdiction of the subject matter of this action on the ground of diversity of citizenship or any other of the grounds alleged in paragraph "FIRST" of the amended complaint.

3. That this action does not arise and has no foundation in title 28 U.S.C. Section 1331, 1332, 1343, 2201 and 2202; Title 42 U.S.C. Sections 1981, 1982, 1983, 1985, 1986, and 1994; and in the Constitution of the United States and in particular Article 1 Section 10 and the Fifth, Sixth, Thirteenth and Fourteenth Amendments thereto, relied on by plaintiffs; and this court has no jurisdiction of defendants by reason of such statutes.

4. That even if it be determined that this action is in conspiracy because of the defendants conspiring amongst themselves to obtain a judgment in their favor in the New York State Court actions enumerated in Exhibit I hereto annexed, this Court has no jurisdiction of such action because of want of diversity of citizenship between plaintiffs and defendants and on the further ground that any such action does not arise under the Constitution or the Laws of the United States.

SECOND: Deny each and every allegation contained in the paragraphs of the amended complaint designated "FIRST", "THIRD (a), (b), (c) and (d)", "SEVENTH", "EIGHTH", "THIRTEENTH", "FIFTEENTH", "SIXTEENTH", "TWENTY-THIRD", "TWENTY-FOURTH", and "TWENTY-FIFTH".

THIRD: Deny that they have any knowlede or information sufficient to form a belief as to the truth of any of the allegations contained in the par-

agraphs of the amended complaint designated "SECOND (a), 1 and 2".

FOURTH: Deny that they have any knowledge or information sufficient to form a belief as to the truth of any of the allegations contained in the paragraph of the amended complaint designated "SECOND (b) 1" except admit that the defendant, Hon. John J. Dillon is a Justice of the Supreme Court of the State of New York.

FIFTH: Deny that they have any knowledge or information sufficient to form a belief as to the truth of any of the allegations contained in the paragraph of the amended complaint designated "SECOND (b) 5 and 8".

SIXTH: On information and belief deny each and every allegation contained in the paragraphs of the amended complaint designated "FOURTH" and "NINTH".

SEVENTH: Deny that they have any knowedge or information sufficient to form a belief as to the truth of any of the allegations contained in the paragraphs of the amended complaint designated "FIFTH", "SIXTH", "TENTH" and "ELEVENTH".

EIGHTH: Deny each and every allegation contained in the paragraph of the amended complaint designated "TWELFTH" except admit the purchase of land by Wasylec from Prudential and the commencement of an action by Wasylec against Prudential to recover the purchase price of $15,000.

tion, have already been fully and fairly tried in the Supreme Court of the State of New York, Westchester County, in the consolidated action set forth in Exhibit "1"; that the judgment rendered therein is now res adjudicata and not subject to review, stay, modification or vacatur by this Court; and that by reason thereof the amended complaint herein fails to state a claim for relief.

AS A SECOND SEPARATE AFFIRMATIVE COMPLETE DEFENSE.

THIRTEENTH: That the facts pleaded in the complaint herein fail to state a claim for relief.

FOR A FIRST SEPARATE AFFIRMATIVE PARTIAL DEFENSE.

FOURTEENTH: That the plaintiffs, Prudential Operating Co., Inc., Empire Park Inc., a defunct corporation, are New York corporations and by reason thereof the defendants, Saul Stambler and Rose Stambler, neither of whom are attorneys-at-law, have any right to appear herein for said corporations or to serve and file an amended complaint on their behalf and therefore, the amended complaint as to said corporate plaintiffs must be dismissed.

WHEREFORE, defendants, The Title Guarantee Company, John C. O'Malley and County Dollar Corporation, demand judgment dismissing the amended complaint with costs.

NINTH: Deny each and every allegation contained in the paragraph of the amended complaint designated "FOURTEENTH" except admit that an action under Article 15 of the Real Property Law of the State of New York was commenced on September 14, 1962 by County Dollar Corporation against Empire Park Inc. to bar all claims of Empire in and to property of County Dollar Corporation.

TENTH: Deny each and every allegation contained in the paragraph of the complaint designated "SEVENTEENTH" except admit that the consolidated actions enumerated in Exhibit 1 hereto annexed were tried before Hon. John J. Dillon, Justice of the Supreme Court, at a Special Term, Part II of the Supreme Court, Westchester County, the trial commencing on the 23rd day of September, 1964.

ELEVENTH: Deny each and every allegation contained in the paragraphs of the complaint designated "EIGHTEENTH (a) and (b)", "NINETEENTH", "TWENTIETH", "TWENTY-FIRST" and "TWENTY-SECOND" except admit the rendering by Hon. John J. Dillon, Justice of the Supreme Court of decision referred to in said paragraphs.

AS A FIRST SEPARATE AFFIRMATIVE AND COMPLETE DEFENSE.

TWELFTH: That all issues of fact and law properly cognizable by this Court, if it had jurisdic-

ANSWER TO AMENDED COMPLAINT

JOHN J. BOYLE
Attorney for defendants,
The Title Guarantee Company,
John C. O'Malley and County
Dollar Corporation
Office & P.O. Address
120 Broadway
New York, N. Y. 10005
Telephone CO 7-2231

SUPREME COURT : WESTCHESTER COUNTY

Action No. 1 - Index No. 4644/1962

PETER WASYLEC,

Plaintiff-Respondent,

against

SAUL STAMBLER, ROSE STAMBLER, PRUDENTIAL OPERATING CO.,INC. and EMPIRE PARK,INC., a domestic corporation which was dissolved and EMPIRE PARK, INC., a domestic corporation,

Defendants-Appellants,

JACK JACOBS, S & H BUILDING CORP., NANCY FINCK, individually, NANCY FINCK, HERBERT TANNENBAUM, DOROTHY RUBIN, DAVID JACOBS and JACK HIRSCH, doing business as S & H BUILDING CO.,,

Defendants.

Action No. 2 - Index No. 7840/1962

PRUDENTIAL OPERATING CO.,INC.,

Plaintiff-Appellant,

against

PETER WASYLEC and CROSS-TOWN CORPORATION,

Defendants-Respondents,

S & H BUILDING CORP., COSMOPOLITAN EQUITIES, INC., CROSS-TOWN CORPORATION, NEW ENGLAND MUTUAL INSURANCE CO., THE GREAT ATLANTIC & PACIFIC TEA CO., and DOROTHY RUBIN, HERBERT TANNENBAUM, NANCY FINCK, DAVID JACOBS and JACK HIRSCH, doing business as S & H BUILDING CO., a co-partnership,

Defendants.

Action No. 3 - Index No. 9934/1962

COUNTY DOLLAR CORPORATION,

Plaintiff-Respondent,

against

EMPIRE PARK, INC. and PETER WASYLEC,

Defendants-Appellants.

Exhibit I,
6-25

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- -x

SAUL STAMBLER
ROSE STAMBLER
EMPIRE PARK, INC. (a defunct corporation)
EMPIRE PARK, INC.
PRUDENTIAL OPERATING CO., INC.,

Plaintiffs,

-against-

JOHN J. DILLON
TITLE GUARANTEE CO.
PETER WASYLEC
HARCY FINKE
GEORGE B. GORDON
DAVID AVSTREIH
LEONARD WEISS
JOHN J. O'MALLEY
COUNTY DOLLAR CORPORATION,

Defendants.

- -x

68 Civil Action
No. 937

ANSWER

Defendant, GEORGE B. GORDON, for his answer to plaintiffs' complaint respectfully shows to the Court and alleges:

FIRST: Defendant Gordon appears specially herein to object to the jurisdiction of this Court on the following grounds:

1. All of the plaintiffs and all of the defendants other than defendant Gordon are alleged in the complaint to be New York corporations and citizens of the State of New York. As a result, there is no diversity of citizenship sufficient to sustain the jurisdiction of this Court.

2. There is no Federal question alleged in the complaint for the reason that the statutes which are alleged to apply have no application to the circumstances described in the complaint and the Federal constitutional provisions invoked in the complaint similarly have no application to the circumstances alleged in the complaint.

SECOND: Denies each and every allegation of the first paragraph of the paragraph of the complaint designated "FIRST"; the paragraphs of the complaint designated "SEVENTH", "TWENTY-THIRD", "TWENTY-FOURTH" and "TWENTY-FIFTH."

THIRD: With regard to the second paragraph of the paragraph of the complaint designated "FIRST", admits the allegations thereof except denies that defendant Gordon has any judgment against any of the plaintiffs and that therefore the alleged purposes of the action cannot apply to defendant Gordon.

FOURTH: Denies that he has any knowledge or information sufficient to form a belief as to the truth of the following allegations contained in the paragraph of the complaint designated "SECOND": The first paragraph of subdivision (a) 1 and the first paragraph of subdivision (a) 2; subdivisions (b) 2 and (b) 3.

FIFTH: With regard to the second paragraph of subdivision (a) 1 of the paragraph of the complaint designated "SECOND", denies each and every allegation thereof

except admits that Stambler brings this action individually.

SIXTH: With regard to the second paragraph of subdivision (a) 2 of the paragraph of the complaint designated "SECOND", denies each and every allegation thereof and notes that Mrs. Stambler has neither subscribed nor verified the complaint.

SEVENTH: Admits each and every allegation of the following subdivisions of the paragraph of the complaint designated "SECOND": the first and third paragraphs of (b) 1; (b) 4; (b) 5; (b) 6; (b) 7; (b)8; and (b) 9.

EIGHTH: Denies each and every allegation of the second paragraph of subdivision (b) 1 of the paragraph of the complaint designated "SECOND".

NINTH: With regard to the paragraphs of the complaint designated "THIRD", denies that defendant Gordon ever engaged in the conspiracy alleged therein and, on information and belief, denies each and every allegation of said paragraph with regard to conspiracy alleged against other defendants.

TENTH: With regard to paragraph of the complaint designated "FOURTH", admits that Antoinette Gordon executed an instrument assigning any interests it might have in the identified stock and that the recited assignee was Mrs. Stambler, but denies that Mrs. Stambler as such thereby purchased, said stock because the assignor's intention was to assign only to an agent or designee of Peter Wasylec. Admits that Antoinette Gordon was paid the sum of $750 for

such assignment which was the agreed consideration between said assignor and Peter Wasylec.

ELEVENTH: With regard to the allegations of the paragraph of the complaint designated "FIFTH", denies knowledge or information with regard to the allegations regarding Sadye Schachner; and with regard to the allegations relative to Antoinette Gordon admits that said assignor made no demand or claim for the return of said corporate stock nor instituted an action for the recision of said sale for the reason that the purpose of the said assignor to assign to or for the benefit of Peter Wasylec was accomplished by the decision of the defendant Dillon reported in Exhibit B annexed to the complaint.

TWELFTH: Denies that he has knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs of the complaint designated "SIXTH", "EIGHTH", "TENTH" and "ELEVENTH".

THIRTEENTH: With regard to the allegations of the paragraph of the complaint designated "TWELFTH", admits that Wasylec purchased certain land and that the action described in Exhibit B annexed to the complaint was commenced against the plaintiffs; refers to said Exhibit B for the nature and character of said action; except as so stated denies each and every allegation.

FOURTEENTH: With regard to the allegations of the paragraph of the complaint designated "THIRTEENTH", denies that defendant Gordon participated in the conspiracy and scheme referred to therein; on information and be-

lief denies the existence of said conspiracy and scheme on the part of the other defendants; and except as so stated, denies knowledge or information with regard to the allegations thereof.

FIFTEENTH: With regard to the allegations of the paragraphs of the complaint designated "FOURTEENTH", "FIFTEENTH" and "SIXTEENTH", admits that actions were commenced as described in Exhibit B annexed to the complaint, refers to said Exhibit for a description of said actions; denies that defendant Gordon participated in the conspiracy and scheme referred to therein and on information and belief denies the existence of such conspiracy and scheme on the part of the other defendants; and except as so stated denies the allegations thereof.

SIXTEENTH: With regard to the allegations of the paragraph of the complaint designated "SEVENTEENTH", denies that defendant Gordon made fraudulent, and untrue statements before Dillon; denies on information and belief that the other defendants made fraudulent, and untrue statements before Dillon; admits that a trial was held before Dillon sitting as a Justice of the Supreme Court at White Plains, New York; and except as so stated, denies each and every allegation thereof.

SEVENTEENTH: With regard to the allegations of the paragraphs of the complaint designated as "EIGHTEENTH" through "TWENTY-SECOND", refers to Exhibit B for the substance thereof; denies that defendant Gordon participated

in the conspiracy and scheme referred to in said paragraphs and, on information and belief, denies that the other defendants participated in any such conspiracy and schemes; and except as so stated, denies the allegations of said paragraphs.

AS A FIRST SEPARATE
COMPLETE DEFENSE

EIGHTEENTH: That the facts pleaded in the complaint herein failed to state a cause of action against defendant Gordon.

AS A SECOND SEPARATE AND
COMPLETE DEFENSE

NINETEETH: That this Court does not have jurisdiction of the subject matter of the cause of action against defendant Gordon sought to be alleged in the complaint.

WHEREFORE, defendant, GEORGE B. GORDON, demands judgment dismissing the complaint with costs.

DANIEL B. GOLDBERG
Attorney for Defendant
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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. 1146

SAUL STAMBLER and ROSE STAMBLER individually and SAUL STAMBLER on behalf of PRUDENTIAL OPERATING CO., INC., and EMPIRE PARK INC., and ROSE STAMBLER on behalf of EMPIRE PARK INC., (a defunct corporation),

Petitioners

-against-

JOHN J. DILLON, TITLE GUARANTEE CO., COUNTY DOLLAR CORPORATION, JOHN C. O'MALLEY, PETER WASYLEC, DAVID AVSTREIH, LEONARD WEISS, MARCY FINEE, GEORGE B. GORDON.

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

FOOTNOTE TO PETITION

SAUL STAMBLER
Petitioner Pro Se
137 Brandon Road
Yonkers, New York 10704

Q Could you describe more fully, please, some of the aspects of your professional life and employment by your insurance company? What are your duties.

THE WITNESS: I wonder, Your Honor, is this relevant?

THE COURT: What do you have in mind, Mr. Greenspan? This witness is not testifying as an expert. He is just testifying as to factual matters.

MR. GREENSPAN: I know, Your Honor, but he stated that he gave certain pieces of advice to his mother and in addition to that he stated that he has done certain things with the insurance company. I would like to know exactly what he does with this insurance company.

THE COURT: I suppose that I must allow that question. I don't want you to go too far in going into personal matters. I think what he is asking you, Mr. Gordon, and I think this much is proper, what is the nature of your duties with the company.

A My title is director of advanced underwriting services. I have charge of many technical publications. That's about as far as I can go without becoming unnecessarily detailed. It's one of those catch-all things.

Q Are you involved at all in any real property

transactions for your employer?

A No, I am not.

Q Turning to your mother, does she rely upon you for advice concerning real property transactions?

A No.

Q Does she rely upon you for advice concerning any stock transactions?

A In so far as a mother relies upon a son who is helping her to manage her affairs, yes.

Q Then your mother does rely upon you for advice in the management of her affairs, is that correct?

A I would say yes, in a lay capacity.

Q Only in a lay capacity then, is that correct?

A That's correct.

Q And not as an expert?

A No.

Q With reference to Exhibits 1M, 1N and 1-O in evidence, are these the papers which were received by you from Mr. Stambler?

A In substance, they are. I received papers from Mr. Stambler, read them, passed them on to Mr. Goldberg, some changes were made and these changes were acceptable to Mr. Stambler.

Q Then the paper itself is exactly what was handed to you or transmitted to you other than the changes which were put on that paper, is that correct?

A I am not quite sure I follow you. I think it may have been retyped, if that is what you are getting at. I am sure it was.

Q Is that the exact paper, to the best of your recollection, which you --

A The physical sheet, I think not. I think it was retyped.

Q Do you have with you the exact papers that were in fact transmitted?

A I don't know. I believe so. May I look?

Q Certainly.

A No, I don't believe I do, sir.

Q Today, in court, do you have any independent recollection of the matter contained in the documents actually submitted to you by Mr. Stambler?

A Yes, it was essentially the matter contained in these documents. The changes were changes in language more than anything else.

Q Can you indicate the changes?

A I wouldn't attempt to at this distance in time.

no, sir.

Q When you received these papers from Mr. Stambler, did you make any evaluation as to whether or not these papers were proper?

A No, I did not.

MR. WEISS: I think that starts to get to the area of expertise that Your Honor indicated before.

THE COURT: It sounds that way to me, too. You mean improper from a legal standpoint?

MR. GREENSPAN: No, Your Honor. Mr. Gordon had testified that he relied on what Mr. Stambler -- on what representations Mr. Stambler made to him and I just wanted to get his opinion at this point as to the papers that were originally transmitted --

THE COURT: But as to what?

MR. GREENSPAN: As to whether or not they seemed to be in order, whether or not they were proper, whether or not he could rely on those papers independently without seeking other advice, which is the next question I wanted to ask him.

THE COURT: He testified that he passed the papers on to Mr. Goldberg who was his co-administrator. Is he a lawyer?

THE WITNESS: Yes, he is the attorney for the estate.

THE COURT: So it is obvious --

Q Then you didn't rely on those papers, is that correct, without first having them examined by Mr. Goldberg, is that correct?

A I don't want to appear to quibble, sir. I had them examined by counsel before they were signed. But I wouldn't pass them on to counsel unless I were relying -- unless I had understood what their purpose was.

Q In other words, you fully understood what their purpose was before you handed them on to counsel?

A Yes.

Q And you relied on them prior to their being sent on to counsel, is that correct?

A To accomplish that purpose, yes.

Q What was your purpose exactly for handing them to counsel?

A Frankly, that we had helped Mr. Wasylec, or thought we had so many times in this area that we felt we should just as well go along and help him further if that was going to help clear things up.

Q Then what was your purpose in handing these to

counsel?

A I wouldn't advise anyone to execute a legal document without legal advice.

THE COURT: You know, we all really love that answer. I wish all laymen felt that way.

Q Turning to prior transactions with Mr. Wasylec to which you previously testified, did you also submit those transactions to Mr. Goldberg for his approval?

A Yes. I think I can say without qualification that all such documents were submitted to counsel.

Q Without qualification?

A Yes.

Q Do you today in court have any independent recollection of the events which transpired with Mr. Stambler and your mother and Mr. Goldberg in the fall of 1960 without refreshing your recollection?

A And without being held to precise dates?

Q Yes.

A Yes, I do.

Q Would you please state your recollections, independent of anything that you may use to refresh it.

A My recollection is that first I had either a telephone call or a letter, and I believe it was a tele-

phone call, from Mr. Stambler telling me of his relationship to a title or abstract company that was working on behalf of Mr. Wasylec, stating that in order to obtain what they thought was proper title they needed to have something further from Empire Park, Inc. It developed that that something further, since apparently the corporation had been dissolved many years before, was -- and here I can only thrash out because of what occurred, sir -- was an assignment of the stock interest if any existed so that there would be some continuing corporate authority. He asked if we were willing to do what was necessary in that regard and that they were willing to compensate for the additional trouble. I said yes, we were willing to do it in principle and would he send his papers along. They would be checked and in due course he would hear. They were checked, we made an appointment for him to come to No. 1 Fifth Avenue. My mother and I gave him the documents he requested of us.

Q That is all that you recall independently?

A Yes.

Q Today in court, is that correct, without refreshing your recollection from any papers which you may have in your possession.

A I think that is a fair statement, yes.

Q Did there come a time in the year 1961, Mr. Gordon, when you executed an affidavit on or about the 27th day of July in that year?

A Yes.

Q At the time you executed that affidavit, did you have an independent recollection of the facts which are contained in that affidavit without refreshment of your recollection in any manner?

A Much more so than I do today. It was that much closer in time. It was also executed at a time when we were meeting on ordinary business affairs and had our files at hand.

Q Then you would say that your recollection in 1961 was superior to your recollection today, is that not correct?

A I suppose it would have to be, sir.

Q So that statements you may have made either by way of affidavit or orally in 1961 would be more accurate than any statements you could make today, isn't that also correct?

A Are apt to be more accurate. Not necessarily would be.

Q You testified, Mr. Gordon, that Mr. Stambler represented himself to be an officer of a title company. How did Mr. Stambler make that representation to you? Did

he say, "Mr. Gordon, I am an officer of Blank Title Company," or how did he make it?

A I don't know. I assume that he introduced himself as such and such an official of such and such a company. In any event, when he wrote, he wrote on an official letterhead.

Q Of a title company?

A Or an abstract company. I forget which.

Q Isn't it a fact that you assumed that he was an officer of a title company but that you didn't know that he was an officer of the title company? Isn't that correct?

A I made no inquiries beyond the superficial indications, no.

Q Isn't it also a fact that Mr. Stambler never said to you in so many words, "I am an officer of Black Title Company"?

A I do not know.

Q You do not know today, is that correct?

A I do not know that that is a fact.

Q Did you know whether or not this was a fact in 1961?

A I don't know.

Q Did you know whether or not that was a fact in

1960, when the representation was allegedly made?

A I do not know.

Q You stated that the first contact you had with Mr. Stambler was either by way of a telephone conversation or by way of a mail communication. Isn't it a fact, Mr. Gordon, that it was by way of a telephone conversation?

A I believe so, but I was not certain.

Q Isn't it a fact that Mr. Stambler called you on the phone and said in so many words, "I am working on getting marketable title to a piece of land in Yonkers owned by Empire Park, Inc. and that I was referred to you as the son of Milton Gordon who was president of that company," isn't that what Mr. Stambler said to you on that first telephone conversation?

A I don't remember that first telephone conversation, sir. It could be what he said to me. It could be part of what he said to me. I do not recall.

Q Isn't it also a fact that you didn't understand the name that Mr. Stambler gave to you over the phone and that you asked him to repeat it? In fact, you asked him to spell it. Does that refresh your recollection?

A I'm sorry, it does not.

Q Isn't it also a fact, Mr. Gordon, that you per-

sonally asked Mr. Stambler at that conversation whether or not this was in fact the same land that Mr. Wasylec was interested in?

A I may have.

Q But you don't recall?

A I don't recall. I recall only the general impression.

Q Did you have any better recollection in July of 1961?

A I don't know how I could quite answer that question with any honesty.

MR. GREENSPAN: Then I will withdraw the question.

Q Returning to that conversation again, isn't it a fact that you said to Mr. Stambler in words or substance "That I told him," meaning Wasylec, "and I can tell you," meaning Stambler, "that I have no knowledge of Empire Park and that my father," meaning Milton Gordon, "had quite a few corporations but I don't know anything about them and had no connection with any of them." Didn't you make that statement to Mr. Stambler at that time?

A I don't know, but I could have. It would be quite accurate.

Q Isn't it a fact that Mr. Stambler asked you if

you could suggest the name of anyone who was associated with your father who could possibly give him information concerning Empire Park, Inc.?

A I don't recall that.

Q Have you ever had any dealings with anyone concerning Peter Wasylec, other than Mr. Stambler?

MR. WEISS: If Your Honor please, I think there ought to be a little more certainty in terms of what subject, when.

MR. GREENSPAN: I agree. I will clarify that.

Q Concerning prior transactions with Mr. Wasylec as you have previously testified.

A Have I?

Q Yes.

A No.

Q You have never met anyone connected with Mr. Wasylec on certain matters?

A Not to the best of my recollection.

Q On this transaction in question, did you meet or were you introduced to anyone other than Mr. Stambler who allegedly was connected with Mr. Wasylec prior to the execution of these documents, L, M and O in evidence.

A I myself, no.

Q Did you ever meet anyone in connection with the same matters just asked representing him or purporting to represent him as an attorney?

A I did not, no.

Q Isn't it a fact, Mr. Gordon, that in all of the prior transactions which you had with Mr. Wasylec, Mr. Wasylec was never represented by an attorney?

A I do not know. He could have been represented by an attorney without the attorney being in touch with me.

Q But it is a fact that no attorney on behalf of Mr. Wasylec was ever in touch with you on those prior transactions, isn't that correct?

A With me as an individual?

Q Yes.

A That's correct.

Q Do you have any knowledge whether anyone as an attorney repreeinting Mr. Wasylec was in touch with any other individual?

A Yes, I do.

Q Concerning the transactions prior to the one in question.

A Possibly even including the one in question. I have no knowledge of that.

Q Do you have any knowledge as to who that attorney was?

A Yes.

Q What was his name?

A A man named McQuade.

Q John McQuade?

A I think it was John McQuade.

Q And it was Mr. McQuade who was representing Mr. Wasylec in prior transactions, I mean prior to the fall of 1960?

A You are asking me, sir, to testify to something I know only on the basis of hearsay.

THE COURT: He wasn't in touch with you, is that right?

THE WITNESS: He was not.

Q When Mr. Stambler first communicated with you, did you call Mr. Wasylec to ascertain just who Mr. Stambler was?

A I don't know. I really don't.

Q Could you have called Mr. Wasylec?

A I could have or I could not have. I just have no recollection, sir. There is a certain assumption that when someone calls you under those circumstances he is

representing his status properly.

MR. HECKER: I move to strike out the latter portion of his answer as not responsive.

THE COURT: I must strike it out.

Q In 1961 when you executed this affidavit, did you have any recollection as to whether or not you communicated with Mr. Wasylec concerning Mr. Stambler prior to turning over to him the documents L, M and O in evidence?

MR. WEISS: If Your Honor please, I think that if there is going to be any more discussion and direct discussion to this affidavit, I think it ought to be either marked or identified or submitted in evidence.

THE COURT: Will you read back the question?

(Question read.)

THE COURT: I don't know what the affidavit is being used for. It isn't being used to impeach the witness in any way up to this point and I find it difficult to understand what the reference to the affidavit means.

MR. GREENSPAN: If Your Honor please, Mr. Gordon used this affidavit to refresh his recollection as to events which occurred in 1960.

THE COURT: He did on one or two occasions.

MR. GREENSPAN: I am merely asking him as to whether or not his recollection at the time he executed this affidavit which he uses today to refresh his recollection is any better than it is now. I want to know whether he knew in 1961.

THE COURT: I will overrule the objection and let Mr. Gordon answer the question, if he can.

A I assume it was. Perhaps if the thing you are specifically searching for is stated in the affidavit you will allow me to refresh my recollection again, I could answer you.

Q Do you have any knowledge of whether or not your attorney, Mr. Daniel Goldberg, communicated with Mr. Wasylec concerning the alleged representation of Mr. Stambler?

A I don't know whether Mr. Goldberg communicated with Mr. Wasylec. I know that they had some communication.

Q Did they have this communication prior to the execution of the documents LM and O in evidence?

A I do not know. I think not.

Q You think not, or do you know?

THE COURT: He said "I think not."

A I do not, but I think not.

Q Then it is your testimony so far, Mr. Gordon, that you and your mother upon the advice and approval of your counsel turned over these documents, M, N and O, to Mr. Stambler purely upon what you believed was the representation that he was an officer of a title company interested in this real property which Mr. Wasylec was interested in, is that correct?

MR. WEISS: If Your Honor please, I don't think this is a fair recital of the evidence.

THE COURT: I feel the same way about it. I sustain the objection. I don't think that is the full story of what this witness has testified to.

Q Isn't it a fact, Mr. Gordon, that you had a second conversation on the telephone with Mr. Stambler prior to ever meeting him in 1960?

A This is possible.

Q Didn't Mr. Stambler at that second conversation tell you that he was trying to locate an individual known as G. Byron Gordon? Does that ring a bell?

A No, he could have told me that the first time if there were two conversations.

Q Isn't it also a fact that in this second conversation Mr. Stambler told you that the G. Byron Gordon he

was looking for was an individual who signed deeds for Empire Park as vice president? Does that refresh your recollection?

A I don't recall Mr. Stambler saying so. He may have.

Q Let me ask you now, were you ever vice president of Empire Park, Inc.?

A I testified before that I had on occasion for short periods been an officer of one or more of my father's corporations.

Q And as such officer were you a vice president?

A Perfectly possible.

Q But you don't recall?

A Not at this stage. That was 25 years ago.

Q Mr. Gordon, if my recollection is correct you testified that among the papers Mr. Stambler sent down to you was a deed of some kind, is that correct?

A I think I did say that. I think I was mistaken.

Q Then we can let the record state now that there was no deed sent down?

A I believe it was just the three documents.

Q Namely the assignment --

A M, N and O, the assignment and the two affidavits.

Q One by you and one by your mother, is that correct?

A Yes. I am sorry about that.

Q Did Mr. Stambler state to you that he was willing to compensate you for your troubles?

A He did.

Q Isn't it a fact that he asked you how much money you personally, or you and your mother, wanted for these documents?

A That I don't know. I know that he asked how much was wanted and I told him what I thought he should pay my mother.

Q What did you tell him you thought he should pay your mother?

A My recollection is that I thought he should pay her $1,000 and we settled on $750.

Q In other words, you were bargaining, is that correct?

A It took about that long, if you want to call that bargaining.

Q But there was a demand -- not a demand, a request made from you on behalf of your mother for $1,000, is that correct?

A That's correct.

Q And Mr. Stambler said no, he only wanted to pay

$750?

A I really don't recall the details, but that is my recollection.

Q And you settled for the $750 that he wanted to pay, is that your recollection?

A It was hardly an extended negotiation, sir. That, I think, did take place over the telephone and well within the three minutes.

Q Isn't it a fact that at this third conversation with Mr. Stambler on the telephone again that he asked you to sign a deed as vice president of Empire Park, Inc. and turn it over to him?

A I don't know. I don't recall it. It could have happened.

Q Didn't he also ask you to have your mother sign a deed as surviving director of Empire Park, Inc.?

A Again, I don't know, but apparently some such recollection sticks in my mind or I would not have identified a deed as being one of the documents.

Q I am merely trying to be helpful to you, Mr. Gordon.

A I am trying to be helpful to you, but what I don't know, I don't know.

Q At the time Mr. Stambler asked you concerning assignments of stock interest, didn't you say to him you didn't know whether you had any? I am referring to stock interests in Empire Park, Inc.

A That I individually had any?

Q Yes.

A To the best of my knowledge I never had any.

Q Then the assignment of stock was made only by your mother, is that correct?

A There may have been a question as to whether there should be an assignment of stock by the co-administrators. But the assignment was made only by my mother.

Q But didn't Mr. Stambler tell you that he didn't want any guarantee from you or your mother that they owned anything but merely an assignment of anything that they might have or did own? Does that ring a bell?

A Only to the extent that I should like to take credit for stating first that we couldn't guarantee the value of anything that we gave him.

Q And so far as you are concerned, your mother received $750 for something which could have had no value?

A Of which the buyer was apprised would very probably have no value.

Q I am sorry, I didn't understand the last.

A I made it quite clear to Mr. Stambler, as I had to Mr. Wasylec when we gave him quit claim deeds without compensation, that we didn't think they were worth a great deal.

Q Does the name Mann B. Rheinish mean anything to you?

A No, sir.

Q You have never heard that name?

A Not that I recall.

Q Does the name Joseph P. Day mean anything to you?

A Since before you and I were kids he was a real estate auctioneer in New York, yes. But only in that regard.

Q I refer you once again to December 7, 1960 as to a meeting that took place at 1 Fifth Avenue in the apartment, I believe, of your mother, is that correct?

A Yes.

Q Do you recall whether that meeting took place in the morning or in the afternoon?

A Either afternoon or late afternoon, I believe.

Q Late afternoon or when?

A Some time during the course of the afternoon. I think it was toward the end of the afternoon.

Q You testified that Mr. Stambler and yourself and your mother were there, is that correct?

A That's correct.

Q At the time did you not present the affidavits as corrected or revised by your attorney to Mr. Stambler?

A I think so.

Q Did you notify and apprise Mr. Stambler at that time that changes were made?

A I am sure of that, yes.

Q Didn't you also state to Mr. Stambler that there were no corporate records in existence to your knowledge at that time?

A I think I did.

Q Isn't it a fact that Mr. Stambler stated to you that he spoke to Sadie Schneimer, who verified that there were no records in existence at that time?

A I think that happened then, yes.

Q Didn't you also at that time make a gratuitous statement to the effect that you know this Wasylec is an amazing individual and again to the effect that "Do you know that he came to my house in Maplewood one night after 9 o'clock and begged me to give him a deed?"

MR. WEISS: I think the word "gratuitous" is a

characterization.

THE COURT: Leave that word out.

A I don't know whether I did make such a statement. It's perfectly possible. If I did, it was made in admiration rather than in apparent criticism, as your tone seems to suggest.

Q Yes, exactly. Not in criticism, but in admiration. Do you recall making that statement?

A Yes, I do.

Q Isn't it a fact that in response to that statement, Mr. Stambler said in fact, "I don't know the man. I have heard about him from others but I have never met him and have no connection with him."

A Not that I know of.

Q During the course of your transactions, both by telephone and in person with Mr. Stambler, didn't you apprise Mr. Stambler that Mr. Weyler had informed you that there was an individual employed by Mr. Weyler, or Mr. Weyler's attorney, Mr. McQuade, to search for records of Empire Park and the Gordon family?

A Did I inform Mr. Stambler of that?

Q Yes.

A I don't know. I don't see that it would have

much relevancy either way.

Q Isn't it a fact, Mr. Gordon, that there was such an individual actually engaged in such employ?

A No, my recollection is that Mrs. Gordon's secretary was asked to check to see if there were any such records.

MR. FINK: May I have the answer repeated? I didn't get the first part.

THE WITNESS: My recollection is that my mother's secretary was asked to check to see if among the family records there were any such.

Q Isn't it a fact, Mr. Gordon, that Mr. Wesylee complained to you that he was spending $15 an hour to have an individual search the records to see what he could come up with?

A He certainly didn't complain to me. That's the first I have heard of it.

Q Do you have any direct recollection today in this courtroom, without refreshing your recollection, of Mr. Stembler ever making a statement to you that he was a representative of Mr. Wesylee personally?

A A blunt statement?

Q Yes.

A No, I do not. But I don't have a recollection of

his ever having denied it or done anything to imply anything to the contrary either.

MR. HECKER: I move to strike the latter part out as not responsive.

THE COURT: I must strike it out, but I guess Mr. Weiss maybe will pick that up.

Q Mr. Gordon, did you ever ask Mr. Stambler whether or not he represented in any way Mr. Wasylec?

A I believe I did, on that first telephone conversation.

Q What did you ask him? What was the substance?

A I can't give it to you verbatim. The substance was --

Q What is your best recollection, sir?

A My best recollection is my statement that we had been giving Mr. Wasylec what he required for this purpose and that I assumed that this was more of the same for Mr. Wasylec or his account, that we were not at liberty to deal with anyone else.

MR. HECKER: I move to strike out the latter part as not responsive.

THE COURT: It is responsive. He is telling us what was said on the phone, and that's what he was

asked. Motion denied.

Q Was that the only instance in your recollection that you asked or imparted information to Mr. Stambler implying that he was a representative of Mr. Wasylec?

A I think the whole tenor of Mr. Stambler's meeting with my mother and me was such, that he couldn't help but gather that we viewed him as represeinting Mr. Wasylec, that that was why we were dealing with him.

Q Can you explain something to me, plesse, Mr. Gordon? You and your co-administrators executed a certain quit claim deed to Mr. Wasylec, isn't that correct?

MR. WEISS: Which one?

Q In 1960. Is that correct?

A Yes.

Q At his request?

A Yes, sir.

Q Now you believed that you were giving Mr. Wasylec further documents to help him in his travails, is that correct?

A Yes, sir.

Q Can you explain to me why you wanted $750 on one occasion -- $1,000 on one occasion and only one dollar on a prior occasion?

A Yes, very easily.

Q I would be very interested in hearing that.

A I think it is a very human reason and probably a very frail one. Up until that point what we had been asked to do might be helpful to him, but we were somewhat doubtful as to how helpful and we didn't have the conscience to ask even for the dollar recited in the deed. But there comes a time when one is asked to help too often and when that happens to combine with what looks like a sale and a profit to the person asking for help, then one is apt to ask for a little consideration also for that and prior accommodations.

Q Thank you, that is quite understandable. I don't blame you one bit. Let me ask you something further. This was done not only to help what you believed Mr. Wesylea's cause, but for profit besides, isn't that correct?

A Whose profit?

Q Your mother's profit.

A Call that compensation for her time.

Q But there was a monetary angle to it?

THE COURT: That has been established. $750 was paid.

Q Would you have given these documents without the

consideration?

A Yes, I think we would have.

Q Prior to the execution of these documents and in fact prior to the execution of the quit claim deed for $1, Mr. Gordon, did Mr. Wasylec ever inform you that he was under contract to sell real property through which a gore of land ran which was in fact a defect in his title to the surrounding property? Did he ever inform you of that?

A That was what I had reference to when I said that at the time of the dealings with Mr. Stambler circumstances had changed sufficiently so that we felt we could in good conscience ask for some consideration, yes.

Q Then he did tell you he was selling the property, is that correct?

A Yes.

Q Did he tell you for how much?

A No. It was none of my business.

Q Then you didn't ask him.

A No, It was none of my affair.

Q You had no concern?

A None at all.

Q At the time you tendered these documents, M, N and O, did you know how much Mr. Wasylec was under contract

to sell the property for?

A I did not.

Q Did you ask at that time of Mr. Stambler how much the property was going to go for?

A No.

Q Do you know today how much the property was going for?

A I do not.

Q If I were to tell you, Mr. Gordon, that Mr. Wasylec sold this property for $130,000, would that change your opinion in any way?

A Not in the least.

THE COURT: Opinion as to what?

A Not in the least. He asked us to do something from which he could benefit which couldn't possibly hurt us in relation to property that was not of our concern. I hope he sold it for a million three hundred thousand dollars.

Q And you would not have asked any more than the thousand dollars?

A No, I was trying to turn off what might become a nuisance.

Q It seems difficult to believe, Mr. Gordon, that you deal with a man like Mr. Wasylec, who you felt was be-

coming a nuisance, and always dealing with him personally, yet the first individual who comes along, under circumstances upon which you say you assume that he is a representative of Mr. Wasylec, and you deal with him without at any time contacting Mr. Wasylec whom you dealt with personally --

THE COURT: Don't comment, because that is not a question. That is prolonged argument.

MR. WEISS: I think it's a discourse, if Your Honor please.

THE COURT: So without waiting for somebody else to do it, I sustain the objection.

MR. WEISS: I am just getting a little weary at the end of the day.

THE COURT: We all are, I would say. Maybe the witness is, too.

Q Just a few last questions, Mr. Gordon. Prior to the execution of the documents M, N and O, you say they were changed or altered in some way by your attorney, is that correct?

A Yes, sir.

Q Then you signed those documents and had your mother sign them in front of Mr. Stambler, is that correct?

A That's correct.

Q Prior to handing those documents to Mr. Stambler and in Mr. Stambler's presence, did you do anything else?

A You mean between the signing and the handing over?

Q That's correct.

A Not that I recall. I know that during the course of that meeting I was on the phone to counsel. But I don't know at what point in the meeting.

Q When you say you were on the phone with counsel, was that with Mr. Goldberg?

A Yes.

Q What did you do with Mr. Goldberg over the telephone at that point?

A I think I read him the documents prior to their being signed and executed.

Q You mean the same documents which had been changed and prepared by Mr. Goldberg?

A Yes.

Q You read to him again?

A Yes. Presumably some question had arisen.

Q You refreshed your recollection with a certain affidavit, isn't that correct?

A Yes, sir.

Q Some time around the 21st day of July, 1961?

A Yes.

Q Did you prepare that affidavit?

MR. WEISS: Do you mean writ it? What do you mean by prepare?

A I am a bit lost, too. I don't know what you mean.

Q Did you write it? Did you dictate it? Are those your words?

A I don't know whether I dictated it and sent it on to Mr. Goldberg or whether he talked about it, he dictated and I corrected it and we put it in final form. To a degree they are my words.

Q Did you have any discussion with Mr. Wasylec concerning the preparation of this affidavit?

A I don't believe so.

Q None whatsoever?

A Not that I can recall.

Q Did you have any discussion with any attorneys purporting to represent Mr. Wasylec concerning this affidavit?

A Not that I can recall. I can't even see why I should have.

Q At whose request did you prepare this affidavit?

A My recollection is that at a meeting on other

matters, Mr. Goldberg brought up this question. And the affidavit was prepared as a result of our discussions about meeting for other business.

Q Then your testimony today under oath is that you never consulted with any attorneys purporting to represent Mr. Wasylec concerning the preparation of this affidavit?

A I have no recollection of ever doing so.

Q Prior to your appearance in court today, did you ever meet Mr. Weiss?

A No, sir.

Q Did you ever meet Mr. Avstreih?

A No, sir.

Q Did you ever meet Mr. Martino?

A I haven't met him yet.

Q Have you met any representative of the law firm of Avstreih, Martino & Weiss?

A Not to my knowledge, other than here today.

Q And you never spoke to them before?

A No, sir.

Q And you never had any conversation with Mr. Weiss concerning your testimony in court today, is that correct?

A That is not correct. Mr. Weiss called me a couple of days ago and asked me to be prepared to come up

here.

Q That was the first time you had been in contact with Mr. Weiss?

A Yes, sir.

Q Did you ever have any prior contact with Mr. Avstreih?

A No, sir.

Q At the time that you had this conversation with Mr. Weiss concerning your appearance in court today, did Mr. Weiss give you any information concerning what he expected your testimony to be?

A Yes. He told me that he would send me a copy of the affidavit and that I would be asked to testify as to what occurred.

Q At the time you prepared this affidavit, or at the time you executed it, were you told what purpose it would be used for?

A Yes.

Q What purpose were you told for its use?

A I was told that Mr. Wesylee would probably try to assert his rights.

Q That's all you were told?

A Isn't that enough?

Q I don't know. I am not answering your questions, sir. I hope you are answering mine. Were you told anything else?

THE COURT: What is the question now?

Q I want to know what he was told as to the use for this affidavit.

A That in all probability Mr. Wasylec would have to sue Mr. Stambler and that it was necessary to have a statement of precisely the capacity in which I had dealt with Mr. Stambler. I was not requested to make an affidavit as to anything but the capacity in which I had dealt with Mr. Stambler, no matter what that might be.

Q At any time did Mr. Stambler give you any assurance or direct positive statement that he was representing Mr. Wasylec?

A I thought he did on that initial telephone call.

Q That is the only assurance?

A That is my recollection.

MR. GREENSPAN: Thank you.

THE COURT: Is that all, Mr. Greenspan?

MR. GREENSPAN: Yes, Your Honor.

THE COURT: Following the order in which the names appear in the title, do you have any questions,

Mr. Roy?

MR. GRUSS: No questions.

MR. ROY: If I might be permitted to ask one or two?

THE COURT: Go ahead.

BY MR. ROY:

Q At any time in your conversations with Mr. Stambler or Mr. Wasylec, was the name of Marcy Finke or Jack Jacobs mentioned?

A Not to my knowledge, sir, no.

Q At any time in your conversations that you had either with Mr. Wasylec with reference to the deed which you prepared for him in October, 1960, or with the assignments which were prepared and delivered to Mr. Stambler, were you shown any maps or diagrams purporting to indicate the property which you were asked to convey?

A I am a bit confused, sir. I think that if you are referring to the earlier deeds --

Q I am only referring to the deed that Mr. Wasylec came to get from you in October, 1960.

A I don't think so, because to the best of our knowledge, we had no further property interests there anyway. We were offering a quit claim deed which we ourselves said

had doubtful value.

Q There was a description in this deed, was there not?

A Yes, there was.

Q Did you have any idea of what the description contained, what land it referred to?

A After I could validly give a quit claim deed to this court house.

Q But you never inquired as to what particular piece of property you were asked to give a quit claim deed to?

A No, I think Mr. Goldberg had the maps in his office and probably satisfied himself on that score. My recollection is that I knew only that it was something in this Empire Park tract up here.

Q And I take it that your answer is the same when you had your dealings with Mr. Stambler, that you had no maps?

A That's correct.

Q Or surveys?

A The land wasn't involved.

Q You testified that this affidavit which you used to refresh your recollection, in your testimony here today, was prepared following a conversation with Mr.

Goldberg, is that correct?

A Yes, sir.

Q This was your attorney?

A Yes, sir.

Q Did he ask you to make this affidavit?

A Certainly not until after he had first reported -- after we had had our conversation and he had reported events that had transpired within the past few days or weeks.

Q Did he advise you that he had been asked to request you to make such an affidavit?

A I shouldn't be surprised.

Q Did he indicate to you who had made this request to him?

A I don't recall, sir. I would assume it was Mr. Wasylec or counsel acing for him.

Q It is a fact that your mother sold her assignment in Empire Park to Mr. Stambler, is that correct, or to the nominee?

A Yes, sir.

MR. ROY: No further questions.

BY MR. HECKER:

Q Mr. Gordon, when did you find out for the first

time that the person with whom you had been talking, that is, Mr. Stambler, was not representing or had not represented Mr. Wasylec?

A Either on the date appearing on that affidavit, sir, or within a few days prior thereto.

Q And after this time, or this date, did you communicate with Mr. Stambler in any respect whatsoever?

A To the best of my recollection I had no communication with him since the day he, my mother and I met.

Q Since that day did you at any time demand or request that Mr. Stambler or the nominee or assignee in the assignment executed by your mother to return the documents or papers to you?

A No.

Q Did you at any time since that date, Mr. Gordon, offer to return to the nominee any part of the $750 which your mother received?

A Not that I remember.

Q It is a fact, is it not, Mr. Gordon, as you just testified a few moments ago, your mother sold her interest in Empire Park, did she not?

A I think that is over-stating it, sir. My mother assigned whatever interest she may have had left in Empire

Park.

Q She sold whatever interest she may have had, is that correct, is that your language?

A Yes, sir.

Q No question about that in your mind, that it was a sale of whatever interest she had?

A That's correct.

Q All of her interest in Empire Park at that time, is that correct?

A All of her interest as a stockholder at that time, yes.

Q And she did do that voluntarily, didn't she?

A Certainly.

Q At the time that she did execute this assignment and the other documents, she did know what she was doing, did she?

A I assume so.

Q When the sum of $750 was paid, was it paid to you or to her?

A To her.

Q And she accepted the $750?

A Yes.

Q And she deposited the check and kept the proceeds,

didn't she?

A I haven't the faintest idea what she did with the proceeds.

Q I say she kept the proceeds.

A She deposited the check. I don't know what she did with the proceeds.

Q The check was good, wasn't it?

A I assume so.

Q You testified, and if I am incorrect in this, you will correct me, Mr. Gordon, you testified that Mr. Wasylec came to you at a certain time and he told you that he was selling the property. Did you testify to that?

A No, I testified that I had heard from Mr. Wasylec that he was selling the property.

Q When you state that you heard from Mr. Wasylec, does that mean that you didn't hear it from him directly?

A No, but it means that I may have heard it over the telephone or I may have heard it from him in person. I am not sure.

Q Then is it correct to state that Mr. Wasylec did tell you or conveyed to you directly or indirectly that he was selling his property?

A I don't mean to quibble, sir. He either told me,

communicated that to me, or to Mr. Goldberg from whom I had it. I am not sure which.

Q When he was talking about selling the property, was that with respect to the sale that you have heard some testimony about here in court?

A I don't know. I can just assume so.

Q Can you give us approximately the time when you heard that Mr. Wasylec was selling the property?

A I can guess at it, but its' a matter of recollection that it would be shortly before the dealing with Mr. Stambler.

Q That is your best recollection?

A That is my recollection. My recollection is that the dealings with Mr. Stambler were necessary in order to further Mr. Wasylec's sale of the property, yes.

Q If it should develop that this conversation you are talking about occurred after you had executed these papers and delivered these papers to Mr. Stambler, then would your recollection of the facts be erroneous?

A No, my recollection of that particular fact and its position in time would be erroneous.

Q So that your testimony with respect to any facts occurring in connection with Mr. Wasylec's request pertaining

to execution of any documents or papers would then necessarily have occurred after the delivery of these documents by your mother?

A I don't understand.

Q If it should develop, or if it should be assumed that the conversation you are testifying to about Mr. Wasylec telling you that he was selling the property, if that conversation occurred after the documents were delivered by your mother, then your testimony with respect to what occurred as a result of that conversation or occurring after that conversation would indicate that it occurred after the documents were delivered by your mother?

A I don't recall ever testifying, sir, that any action was taken as a result of that information or conversation.

Q Let's see whether --

A We assumed that Mr. Wasylec wasn't a collector of land. He must have been trying to do something with it and we were trying to help him.

Q Let's see whether we can get it another way. You testified that Mr. Stambler made certain statements to you and that certain action was taken by you and documents executed by your mother as a result of these statements by

Mr. Stambler and that your mother received the consideration for the execution of these documents after Mr. Wasylec told you he was selling the property and if you were not aware of that you would not have executed the documents, is that what you are trying to say?

A No, sir, that is not what I am trying to say, nor is it what I have testified to.

Q Then, with respect to this conversation you had with Mr. Wasylec about selling the property, tell us when that occurred with respect to the execution of these documents.

A I Do not know and I don't think that it would matter a hoot.

Q As far as you are concerned, it wouldn't matter a hoot, would it, Mr. Gordon?

A We would have executed the documents on the assumption that they were for Mr. Wasylec in any event.

MR. HECKER: I move to strike it out as not responsive.

MR. WEISS: He is asking for it.

THE COURT: I will let it stand.

Q At the time that you were executing these documents, Mr. Gordon, were you then under the impression that

Mr. Wasylec was selling the property?

A I had always been under the impression that Mr. Wasylec intended to sell the property.

Q At this particular time, were you under the impression that he was then selling the property?

A That a sale was actually in process?

Q Yes.

A I think so.

Q Did there come a time, Mr. Gordon, when Mr. Goldberg called you and told you he had heard from a certain Mr. McQuade in connection with this Empire tract? Did there come such a time?

A There did.

Q When did that occur?

A My recollection is quite a bit before this Stambler transaction.

Q So that the contact with Mr. McQuade occurred in your recollection again prior to the execution of these documents by your mother?

A I believe so. It may not have, but I believe so.

THE COURT: Who has M, N and O? May I see these for a moment, please?

(Documents handed to the Court.)

Q Before these documents, referring to Exhibits M, N, O and P, were executed by your mother or by you, did you read them?

A M, N and O I am relatively familiar with, but P is a stranger, isn't it?

MR. WEISS: P is a letter.

THE COURT: A forwarding letter.

A My mother never executed document P. That was a document signed by Mr. Stambler.

Q Just so that there won't be any misunderstanding, Mr. Gordon, I will show you these documents --

MR. WEISS: Could you show him those marked?

A I have them here, Mr. Hecker. M is an assignment from my mother, N is her affidavit and the other is my affidavit.

Q Exhibits M, N and O, before they were executed, did you read them?

A Certainly.

Q And did your attorney read them?

A Yes.

Q Did you discuss them with your attorney before they were signed?

A Yes.

Q And were you fully aware of their contents?

A Yes, sir.

Q And you consented to the contents of these affidavits before, or documents, before you signed them, is that correct?

A Yes.

Q When you signed the assignment of the stock holdings or your mother signed the assignment of the stock holdings, did you see the name of Rose Stambler in there?

A Unquestionably.

Q Did you see it?

A Yes, sir.

Q So that you were aware at that time that the name Rose Stambler was in those documents?

A Yes, and I questioned it.

Q And at the time that you had these documents before you and were about to execute them, did you ask Mr. Stambler as to whether he had a check ready for you?

A I assume so. That was before the document was signed, wasn't that?

Q And you were interested in $750, were you not?

A Not particularly. I wasn't getting it. My mother was.

Q You wouldn't give a hoot --

THE COURT: He said he wasn't getting it.

Q You say you wouldn't give a hoot for $750?

THE COURT: He didn't have $750 involved in this transaction. He didn't get a nickel out of it.

Q You were interested in seeing that your mother got $750?

A Yes.

Q Did you at any time, Mr. Gordon, know what problem had arisen with respect to this property?

A In specific detail, no.

Q The statements to which you refer in your affidavit of July 21, 1961 which you state you made up, that was made up after you had spoken to your attorney, Mr. Goldberg?

A Yes.

Q And it was made up from statements made to you by Mr. Goldberg, is that correct?

A I think I rather resent that. It was made up from statements that were constructed from my recollection and my records.

Q I say the affidavit was prepared because of statements made to you by your attorney, Mr. Goldberg.

MR. WEISS: That is not what he said.

A That is not the way you asked the question before. I am sorry if I misunderstood.

Q That's the question I am asking you now.

A It was drafted by Mr. Goldberg on the basis of things I told him.

Q But it was drafted because of statements by Mr. Goldberg to you with respect to this matter?

A That's correct.

Q And did he tell you who he heard from in connection with these particulars in your affidavit?

A I don't recall, but I assume that he heard from Mr. Weyler.

MR. BECKER: At this time I would like to offer in evidence the affidavit of Mr. Gordon which is on record in this Court and request the Court to take judicial notice of it.

THE COURT: Is there any objection from anybody?

MR. FINKE: I have no objection.

THE COURT: All right. Let it be marked. If it is being offered in evidence, it is not a question of judicial notice. I would suggest if somebody has a copy that it be physically marked.

MR. WEISS: Actually, the original was brought up here by myself, unless I am mistaken, and if that be so, we would be happy to have this marked if that is what you want.

MR. ROY: May I see that? I haven't seen it.

MR. O'MALLEY: I have no objection to the affidavit.

MR. ROY: I have no objection either.

(Affidavit of Mr. Gordon was marked Prudential Exhibit No. A-1 in evidence.)

BY MR. BECKER:

Q Mr. Gordon, you were told that Mr. Wesyles would have to sue Mr. Stambler, were you?

A I am not certain, sir, whether those words were used or whether that was implied, but I believe those words were used.

Q And that was at the time or immediately prior to the time that you prepared or had prepared for you this affidavit, Prudential Exhibit A-1 in evidence, is that correct?

A Yes, sir.

Q On how many occasions did Mr. Goldberg tell you Mr. McQuade contacted him?

A I don't know; two or three, because I can recall some correspondence with Mr. McQuade. It was Mr. McQuade who wanted to have a search made for records of Empire Park, and it was Mr. McQuade who had agreed to pay $15 an hour for clerical time, and three hours were spent and $45 was billed and never received, and so far as I am concerned, that's the end of McQuade.

MR. FINKE: Will you repeat the witness' answer?

(Answer read.)

Q Do you have any correspondence from Mr. McQuade to which you have reference?

A No, I do not. There was some correspondence in the estate files or Mr. Goldberg's files.

Q At the time you made this affidavit or dictated this affidavit, was your recollection clear of the facts?

A Certainly far clearer than it is today.

THE COURT: You know, gentlemen, because of the number of lawyers who have some right to cross examine this witness and because of the lateness of the hour, I am going to ask all of you to please try to avoid cross examination which is purely repetitious, and this last question is an example of it because this was gone into at length by Mr. Cremegna.

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Q Did you at any time, Mr. Gordon, state in sum and substance that Mr. Stembler was acting on behalf of the title company for Mr. Weeylee? Did you ever make that statement?

A I very well may have. To whom am I supposed to have made it?

Q Do you recall that statement being made to you in that language or in that form?

A Made by me or to me?

Q Did you make that statement?

A I believe I did, to Mr. Goldberg, yes.

Q To Mr. Goldberg?

A Yes, and to my mother.

Q Was that statement in sum and substance made to you by anyone?

A I had thought that statement had been made to me by Mr. Stembler over the telephone in the first conversation and I believe I have so testified three or four times this afternoon.

Q So that there is no question about it; a title company was mentioned to you?

A A title or abstract company. At the moment my recollection is that it was a title company. The impression,

by the way, is confirmed by this letter.

MR. MECHEM: That is all.

BY MR. O'MALLEY:

Q Mr. Gordon, in your affidavit, Prudential's Exhibit A-1 in evidence, in the second paragraph you state, "These discussions resulted in a quit claim deed given without consideration of which copies are annexed." I show you Wesyles's Exhibit 1K for identification and Wesyles's Exhibit 1L for identification and ask you if these are the quit claim deeds referred to in this portion of the second paragraph of your affidavit?

A I believe that they are, sir.

MR. O'MALLEY: I ask that they be marked in evidence as a part of Prudential's Exhibit A-1 in evidence.

MR. WEISS: I have no objection, if Your Honor please.

MR. MECHEM: The same objection, it doesn't relate to the property involved here in this lawsuit, that it is documents which have been prepared and which have been used for purposes other than involved in this transaction.

THE COURT: I don't know what property they relate to, but it does seem to me, Mr. Mechem, that by instru-

ducing the affidavit you thereby render admissible any document which is referred to in the affidavit.

MR. O'MALLEY: And that one of the deeds does relate directly to the property involved in this action.

THE COURT: I overrule the objection. That is K and L.

MR. WEISS: Can we withdraw on behalf of Wesylee K and L?

THE COURT: I don't know. One of the anomolous situations we are in is that your clients, Mr. O'Malley, aren't even in Action No. 1, isn't that right?

MR. O'MALLEY: The title which Empire Park is claiming comes through --

THE COURT: I understand your interest but if we start calling these County Dollar exhibits --

MR. O'MALLEY: My request, Your Honor, was that they be marked in evidence as a part of Prudentials' Exhibit A-1 because they are referred to as annexed to it.

THE COURT: You want to thrust them on Prudential, is that what you mean? I don't think it makes any difference what we call them if they are in evidence and I think the easiest way to do it is to leave them

in as what they started out to be and that was Wasylec's Exhibit. Let them stay in as 1K and 1L.

(Wasylec Exhibit 1K and 1L for identification were received in evidence.)

MR. HECKER: On second thought, I think that I will withdraw my objection and consent that they go in.

BY MR. O'MALLEY:

Q Mr. Gordon, you have testified that a search was requested to be made of your mother's secretary for the records of Empire Park. Did that search turn up any records of Empire Park?

A Not a thing, sir.

Q At any time prior to the execution by yourself and your mother of Exhibits M, N and O in evidence, did Mr. Stembler state to you that he did not represent Mr. Wasylec in making a request for the execution of these documents?

MR. HECKER: Objected to, if the Court please, as calling for negative testimony. I think we can only be concerned with affirmative testimony.

THE COURT: But you brought out the affirmative and I understand why Mr. O'Malley and Mr. Weiss want to bring out the converse of the same proposition.

Actually this witness volunteered this in response to you and you moved to strike it out. I know they would pick it up later. I overrule the objection.

A No, sir.

Q At any time prior to the execution of these documents, Exhibits M, N and O, by yourself and your mother, did Mr. Stambler state to you that he was not a representative of a title company or an abstract company?

MR. HECKER: The same objection.

THE COURT: Objection overruled.

A The same answer, no.

Q You have testified that you noticed the assignment of the stock in Empire Park by your mother ran to Rose Stambler, and I believe you have testified that you raised a question as to why the assignment ran to Rose Stambler. Will you testify what question you raised in connection therewith?

A I thought it odd that there should be a conveyance of this stock to apparently the wife of the person with whom I was dealing when I felt that he was dealing in a more or less fiduciary capcity.

MR. HECKER: Objected to and move to strike it out, operation of the mind.

THE COURT: Yes, I think it is, and I strike it out. But what you are asked to tell us, Mr. Gordon, if you will, is whatever was said at the time about the fact that Rose Stambler was named as the assignee in that instrument.

THE WITNESS: I asked why it was, sir, and was told that this was the convenient way of handling this thing and it was quite all right.

THE COURT: Who told you that?

THE WITNESS: Mr. Stambler. May I testify to my introduction for a moment?

THE COURT: You can only testify to what was said between you at that time.

MR. HECKER: I didn't hear.

THE COURT: Will you read that, please?

(Record read.)

BY MR. O'MALLEY:

Q And did you rely upon those statements of Mr. Stambler in executing your affidavit, Exhibit O, and in submitting the affidavit Exhibit N, and the assignment, Exhibit M to your mother for signature?

A Yes.

Q Did you believe the statements to be true?

A Of course.

Q Did you ever see any stock of Empire Park issued in the name of your mother?

A I don't recall ever having seen any stock of Empire Park.

Q Did you ever see the stock books of Empire Park containing entries showing the issuance of stock to your mother?

A No, sir.

Q Did you ever see any stock of Empire Park issued in the name of Sadie Scheckner?

A No, sir.

Q Did you ever see any entries in the stock book of Empire Park showing the issuance of stock to Sadie Scheckner?

A No, sir.

MR. O'MALLEY: That is all.

THE COURT: Do you have anything further, Mr. Weiss?

MR. WEISS: I have.

REDIRECT EXAMINATION

BY MR. WEISS:

Q Mr. Gordon, do I understand that you reside in New Jersey?

A Yes, sir.

Q Do I also understand that you are employed by a firm that has its place of business in New Jersey?

A Yes, sir.

Q Are you here today, sir, voluntarily?

A Completely.

Q Have you been subpoenaed to come and testify in this case?

A No, sir.

Q Do you, sir, have any financial interest in the outcome of any of these cases that confront us here today?

A Not the slightest.

Q Have you, sir, been given any consideration by my office or anybody in it or Wasylec or anybody else to come here today?

A No, sir.

Q Have you, sir, been promised anything?

A No, sir.

Q By any member of our firm or office or Mr. Wasylec?

A By no one.

Q The truth of the matter is, Mr. Gordon, that until I spoke to you, I think last week, you have testified,

you never saw me in your life. Have you seen me?

A No, sir.

Q Would the same apply to Mr. Avstreih, one of my associates and anybody else in my office?

A Yes, sir.

MR. WEISS: Thank you, sir.

THE COURT: I am going to limit this very strictly on recross because I think this witness has been very, very thoroughly examined and I don't think that further examination can possibly be profitable here.

MR. HECKER: Only with respect to the documents which have been offered into evidence by Mr. O'Malley. I am now directing my remarks as a result of these documents.

THE COURT: He has previously been thoroughly examined as to the circumstances under which they were executed and of course, as far as their contents is concerned, they speak for themselves.

MR. HECKER: If Your Honor will bear with me a moment --

THE COURT: I will bear with you but not very long, Mr. Hecker.

RECROSS EXAMINATION

BY MR. HECKER:

Q Mr. Gordon, you recall signing these documents that are indicated Exhibit 1K and 1L, the deeds to which there has been reference?

A Yes.

Q You recall that?

A I recall signing such documents, yes.

Q After these documents were executed, did you see Mr. Wasylec again?

A I don't know.

Q Did you hear from Mr. Wasylec again after these documents were signed?

A I do not know, sir. I don't know whether I heard from him or Mr. Goldberg did or both of us did.

MR. HECKER: That is all.

MR. O'MALLEY: I forgot to ask one question that I would very much like to ask.

THE COURT: All right, but I hope after you ask that one and get the answer that you don't suddenly think of another one.

BY MR. O'MALLEY:

Q Do you know who constituted the last board of directors of Empire Park, Inc.?

A Beyond being absolutely certain that my father

and mother were both probably on it, no.

Q Do you know whether Rose Stembler was a member of the last board of directors of Empire?

A I would very much doubt it. I don't know, but I would very much doubt it.

MR. O'MALLEY: That is all.

MR. WEISS: Could I thank Mr. Gordon on behalf of everybody concerned?

THE COURT: The Court thanks him. I know he has come a distance and I know he has an appointment that he is anxious to keep tonight.

(Witness excused.)

(Whereupon, an adjournment was taken to September 30, 1965, at the same place.)

* * *

SUPREME COURT, U. S. JAN 9 1971
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

Docket No. 1146

SAUL STAMBLER and ROSE STAMBLER, individually and SAUL STAMBLER on behalf of PRUDENTIAL OPERATING Co., Inc., and EMPIRE PARK INC., and ROSE STAMBLER on behalf of Empire Park Inc., (a defunct corporation),

Petitioners,

—against—

JOHN J. DILLON, TITLE GUARANTEE CO., COUNTY DOLLAR CORPORATION, JOHN C. O'MALLEY, PETER WASYLEC, DAVID AVSTREIH, LEONARD WEISS, MARCY FINKE, GEORGE B. GORDON,

Respondents.

BRIEF AND APPENDIX OF RESPONDENTS, PETER WASYLEC, DAVID AVSTREIH, LEONARD WEISS AND GEORGE B. GORDON, IN OPPOSITION TO WRIT OF CERTIORARI

LOUIS J. MARTINO,
Counsel of Record for Respondents, Peter Wasylec, David Avstreih, Leonard Weiss and George B. Gordon,
Office & P. O. Address,
20 East First Street,
Mount Vernon, New York 10550.

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Cases Cited

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IN THE

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Petitioners,

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JOHN J. DILLON, TITLE GUARANTEE CO., COUNTY DOLLAR CORPORATION, JOHN C. O'MALLEY, PETER WASYLEC, DAVID AVSTREIH, LEONARD WEISS, MARCY FINKE, GEORGE B. GORDON,

Respondents.

BRIEF AND APPENDIX OF RESPONDENTS, PETER WASYLEC, DAVID AVSTREIH, LEONARD WEISS AND GEORGE B. GORDON, IN OPPOSITION TO WRIT OF CERTIORARI

Questions Presented for Review

1. Whether petitioners' amended complaint states a complaint against respondents upon which relief can be granted?

2. Whether the respondents, Peter Wasylee, David Avstreih, Leonard Weiss and George B. Gordon, are entitled to summary judgment dismissing petitioners' amended complaint on the merits?

3. Whether a Writ of Certiorari should be granted herein where there are no special or important reasons therefor?

Statement of the Case

The consolidated actions (1) Peter Wasylee, Plaintiff, v. Saul Stambler, Rose Stambler, Jack Jacobs, Prudential Operating Co., Inc., 8 & 11 Building Corp., Marcy Finke, individually, Marcy Finke, Herbert Tannenbaum, Dorothy Rubin, David Jacobs and Jack Hirsch, doing business as 8 & 11 Building Co., Empire Park, Inc., a domestic corporation which was dissolved, and Empire Park, Inc., a domestic corporation, Defendants; (2) Prudential Operating Co., Inc., Plaintiff, v. Peter Wasylee, 8 & 11 Building Corp., Cosmopolitan Equities, Inc., Cross-Thru Corporation, New England Mutual Life Insurance Co., Inc., The Great Atlantic & Pacific Tea Co., Inc., and Dorothy Rubin, Herbert Tannenbaum, Marcy Finke, David Jacobs and Jack Hirsch, d/b/a 8 & 11 Building Co., a co-partnership, Defendants; and (3) County Dollar Corporation, Plaintiff, v. Empire Park, Inc. and Peter Wasylee, Defendants, were tried before Mr. Justice John J. Dillon (a defendant herein) in the Supreme Court, Westchester County, for approximately nine days and resulted in a judgment entered in the County Clerk's Office of Westchester County on April 22nd 1965, which judgment determined title to a tract of real property located in Westchester County, and in addition thereto granted judgment for $15,106.30 to Peter Wasylee against the defendants, Saul Stambler, Rose

Stambler, Prudential Operating Co., Inc. and Empire Park, Inc. The present respondents, except respondent Mr. Justice John J. Dillon, were parties to the actions in Westchester County, or counsel therein, or witnesses or participants in real estate transactions involved in the actions.

The judgment of Mr. Justice John J. Dillon was unanimously affirmed on June 12th 1967, by the Appellate Division, Second Department. *Wasylec* v. *Stambler*, 28 A. D. 2d 825; *County Dollar Corp.* v. *Empire Park*, 28 A. D. 2d 822; *Prudential Operating Co.* v. *Wasylec*, 28 A. D. 2d 824; all three decisions reported at 282 N. Y. S. 2d 465.

Appeals were taken to the New York Court of Appeals, which, on November 2nd 1967, granted motions to dismiss the appeals. 20 N. Y. 2nd 893.

The notice of appeal stated that the appellants were "relying solely upon the questions directly involving the provisions of Article 1, Sections 1, 5, 6, 7 and 11 of the Constitution of the State of New York and Amendments Fifth, Thirteenth and Fourteenth, Sec. 1 of the Constitution of the United States and Title 42, Sec. 1994 of the United States Code. . . ." Chief Judge Fuld's order of dismissal states its ground to be "that no constitutional question is involved".

The summons and complaint in the within action were served upon the respondents on or about February 9th 1968. The original complaint, in effect, represented a broadside attack on the proceedings, trial, decision and judgment entered as a result of the trial that took place before Mr. Justice John J. Dillon in the Supreme Court, County of Westchester, State of New York.

The separate answers of the respondents consist of generally denying the allegations of the complaint and set forth a number of affirmative defenses. Such affirmative defenses generally consist of the following:

(a) Lack of jurisdiction based upon no federal jurisdiction.

(b) Lack of jurisdiction over the persons.

(c) Res adjudicata.

(d) Failure to state a cause of action.

The within action purports to be based on "Title 28 U. S. C., Sections 1331, 1332, and 1343; Title 42 U. S. C., Sections 1981, 1982, 1983, 1985, 1986, 1994, 2201 and 2202, as well as the Constitution of the United States, and in particular, the Fifth, Sixth, Seventh, Eighth, Thirteenth and Fourteenth Amendments thereto". The theory of the action is that all of the respondents, under color of state law, engaged in a conspiracy to deprive petitioners of their property and violation of constitutionanal rights, and that was intended to be done, and was done by means of the rulings of Mr. Justice Dillon in the lawsuit, some of which were contrary to law and some of which were in excess of the jurisdiction of the New York Supreme Court in which Mr. Justice Dillon sat.

The petitioners herein are raising substantially the same constitutional questions that heretofore have been raised in the Supreme Court as the result of which the Court of Appeals of the State of New York dismissed the complaint "upon the ground that no constitutional question is involved".

The relief sought is the declaration of the state judgment as being void; an injunction against its enforce-

ment; and money damages (except as against Mr. Justice John J. Dillon).

A motion by petitioners for a preliminary injunction was denied by Judge William B. Herlands, with opinion, on March 28th 1968.

Judge John F. X. McGohey, by order with opinion filed July 13th 1968, directed summary judgment for the respondent, Mr. Justice J. Dillon.

Judge Charles Tenny, by order with opinion filed October 7th 1968, granted a motion by petitioners to amend the judgment entered on the order of Judge McGohey and for leave to serve an amended complaint.

Judge Tenney also dismissed the complaint as to the corporation petitioners since corporations cannot appear other than by an attorney at law and neither Rose nor Saul Stambler are attorneys at law.

Judge Inzer B. Wyatt, by order with opinion filed November 8th 1968, denied the application of the petitioners for an order directing one of the named respondents, Hon. John J. Dillon, to appear for the taking of his deposition on oral examination.

An amended complaint was filed by the petitioners on November 29th 1968.

The separate amended answers of the respondents consist of generally denying the allegations of the complaint and set forth a number of affirmative defenses. Such affirmative defenses generally consist of the following:

(a) Lack of jurisdiction based upon no federal jurisdiction.

(b) Lack of jurisdiction over the persons.

(c) Res adjudicata.

(d) Failure to state a cause of action.

All of the respondents moved to dismiss the action for failure of the amended complaint to state a claim upon which relief can be granted (Respondent's Appendix).

Judge William B. Herlands, by order with opinion filed June 23rd 1969, granted the motions of the respondents to dismiss the amended complaint.

By notice of motion dated June 30th 1969, the petitioners moved for an order pursuant to Rule 59 E of the Federal Rules of Civil Procedure to amend the order of Judge William B. Herlands filed June 23rd 1969, dismissing the amended complaint so as to permit the petitioners to amend the amended complaint pursuant to Rule 15 (A) of the Federal Rules of Civil Procedure, and for an order pursuant to Rule 26 (a) of the Federal Rules of Civil Procedure to take the testimony of the respondents, John J. Dillon. The motion was pending before Judge William B. Herlands when he died, and the matter was referred to Judge Inzer B. Wyatt by order of the Chief Judge, filed October 9th 1969.

Judge Inzer B. Wyatt, by order with opinion filed October 24th 1969, denied the application for the petitioners on the law and in the exercise of discretion.

The petitioners filed a notice of appeal dated November 1969, appealing from the judgment entered by Judge William B. Herlands on June 23rd 1969, dismissing the amended complaint in this action. An amended notice of appeal, dated December 8th 1969, was filed appealing from the judgment of Judge William B. Herlands entered on June 29th 1969, dismissing the amended complaint and appealing from the order of Judge Inzer B. Wyatt entered December 1st 1969, denying the motion to reargue petitioners' motion.

The matter came on for argument in the United States Court of Appeals for the Second Circuit on September 14th 1970, and a decision rendered on September 23rd 1970 affirming the judgment entered below dismissing appellants' (petitioners') complaint and the post-judgment orders denying appellants' (petitioners') post-judgment motions (A-B, 20, 21, 22).

BRIEF

POINT I

The amended complaint does not state a cause of action against any of the respondents.

Judge William B. Herlands in his opinion (Appendix to Petition, pages B-5 to B-12) dismissing petitioners' amended complaint, fully analyzed the complaint and set forth in detail all applicable authorities indicating that the amended complaint failed to state a claim against any of the respondents.

POINT II

The respondents, Peter Waslyec, David Avstreih, Leonard Weiss and George B. Gordon, are entitled to summary judgment dismissing petitioners' amended complaint on the merits.

The application resulting in Judge Herland's opinion and judgment entered June 23rd 1969, dismissing petitioners' complaint (App. to Petition, p. 1250), was initiated, among other things; by notice of motion of the respondents, Peter Wasylee, David Avstreih and Leonard Weiss, dated December 19th, 1968, and the supporting

affidavit of Leonard A. Weiss, sworn to the 19th day of September, 1968. Petitioners elected not to submit any documents in opposition to said motion. The motion papers show that there was no conspiracy between the respondents to deprive petitioners of any of their rights, civil, constitutional or otherwise.

POINT III

A writ of certiorari pursuant to Rule 19 should not be granted in this matter.

Rule 19 clearly sets forth the considerations governing review on certiorari, and it is submitted to the Court that the instant Writ in no way satisfies such Rule.

Respectfully submitted,

LOUIS J. MARTINO
Counsel of Record for Respondents, Peter Wasylec, David Avstreih, Leonard Weiss and George B. Gordon
Office & P.O. Address
20 East First Street
Mount Vernon, New York 10550

DAVID AVSTREIH
20 East First Street
Mount Vernon, New York 10550

LEONARD WEISS
20 East First Street
Mount Vernon, New York 10550

APPENDIX OF RESPONDENTS, PETER WASYLEC DAVID AVSTREIH, LEONARD WEISS AND GEORGE B. GORDON

Notice of Motion for Judgment on Pleadings

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

68 Civil Action

No. 537

SAUL STAMBLER
ROSE STAMBLER
EMPIRE PARK, INC. (a defunct corporation)
EMPIRE PARK, INC.
PRUDENTIAL OPERATING CO., INC.,

Plaintiffs,

—against—

JOHN J. DILLON
TITLE GUARANTEE CO.
PETER WASYLEC
MARCY FINKE
GEORGE B. GORDON
DAVID AVSTREIH
LEONARD WEISS
JOHN J. O'MALLEY
COUNTY DOLLAR CORPORATION,

Defendants.

Upon the annexed affidavit of Leonard A. Weiss, sworn to the 19th day of December, 1968, and the complaint in

this action, and the answers of the defendants, Peter Wasylec, David Avstreih and Leonard Weiss, and the amended complaint in this action, and the amended answers of the defendants, Peter Wasylec, David Avstreih and Leonard Weiss, all on file herein in the office of the Clerk of this Court, and upon the record on appeal in the consolidated State Court actions of *Wasylec v. Stambler, et al., Prudential Operating Co., Inc. v. Wasylec, et al.*, and *County Dollar Corporation v. Empire Park, Inc. and Peter Wasylec*, and upon all papers, pleadings and proceedings heretofore had herein, the undersigned will cross-move this Court at a Term for Motions thereof, to be held in the United States Court House, Room 506, Foley Square, Borough of Manhattan, City and State of New York, on the 14th day of January, 1969, at 10:00 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard:

(1) For judgment on the pleadings and dismissing the amended complaint in the above entitled action as against the defendants, Peter Wasylec, David Avstreih and Leonard Weiss.

(2) For an order granting summary judgment against the plaintiffs and in favor of the defendants, Peter Wasylec, David Avstreih and Leonard Weiss dismissing plaintiffs' amended complaint on the merits.

(3) For an order dismissing the plaintiffs' amended complaint on the further ground that no facts or pleadings in said amended complaint stating a claim for relief.

(4) For an order dismissing said amended complaint on the further ground that this court lacks jurisdiction

of the subject matter of this action, that the judgment of the Supreme Court of the State of New York, as unanimously affirmed by the Appellate Division of the Second Department of the State of New York, and upheld unanimously by the Court of Appeals of the State of New York, sought to be vacated and set aside, is res adjudicata of all of the matters set forth in the complaint, and not subject to review, modification or augmentur by this court.

(5) For an order dismissing the amended complaint on the further ground that this court does not have jurisdiction of the parties to this action by reason of lack of diversity of citizenship of the parties hereto.

(6) For such other and further and different relief as to this court may seem just and equitable under the circumstances.

Dated: December 19th, 1968.

Yours, etc.,

AVSTREIH, MARTINO & WEISS
Attorneys for Defendants Peter Wasylec, David Avstreih and Leonard Weiss
O. & P. O. Address
20 East First Street
Mount Vernon, New York

Notice of Motion for Judgment on Pleadings

To:

SAUL STAMBLER & ROSE STAMBLER
Plaintiffs Pro Se
137 Brandon Road
Yonkers, New York

FINKE, JACOBS & HIRSCH, Esqs.
Attorneys for Defendant, Marcy Finke
393 Seventh Avenue
New York, New York

HON. LOUIS J. LEFKOWITZ
Attorney General of the State of New York
attorney for Defendant, John J. Dillon
80 Centre Street
New York, New York

DANIEL GOLDBERG, Esq.
Attorney for Defendant, George B. Gordon
51 Madison Avenue
New York, New York

JOHN J. BOYLE, Esq.
Attorney for Defendants County Dollar Corporation, The Title Guarantee Company and John L. O'Malley sued herein as John J. O'Malley
120 Broadway
New York, New York

Affidavit of Leonard A. Weiss, Annexed to Foregoing Notice of Motion

UNITED STATES DISTRICT OFFICE

SOUTHERN DISTRICT OF NEW YORK

SAUL STAMBLER
ROSE STAMBLER
EMPIRE PARK, INC. (a defunct corporation)
EMPIRE PARK, INC.
PRUDENTIAL OPERATING CO., INC.,

Plaintiffs,

—against—

JOHN J. DILLON
TITLE GUARANTEE CO.
PETER WASYLEC
MARCY FINKE
GEORGE B. GORDON
DAVID AVSTREIH
LEONARD WEISS
JOHN J. O'MALLEY
COUNTY DOLLAR CORPORATION,

Defendants.

STATE OF NEW YORK
COUNTY OF WESTCHESTER } ss.:

LEONARD A. WEISS, being duly sworn, deposes and says:

1. That he is an attorney at law, duly licensed to practice in the highest court of this State; that he has

Affidavit of Leonard A. Weiss, Annexed to Foregoing Notice of Motion

been admitted to practice before this Court; that he is a member of the firm of Avstreih, Martino & Weiss, attorneys at law, with offices at 20 East First Street, City of Mount Vernon, County of Westchester, State of New York.

2. That he is a named defendant in the within action (paragraph 6, page 6 of the complaint). That the named defendant, David Avstreih (paragraph 5, page 6 of the complaint), is one of his law partners.

3. That his firm has, for some years, represented the named defendant, Peter Wasylec, in various matters and represents such defendant in connection with the within action.

4. That he is fully familiar with this matter, having been in charge of the litigation leading thereto, and submits this affidavit in support of a motion for judgment on the pleadings dismissing the complaint as to the defendants, Peter Wasylec, David Avstreih and Leonard Weiss.

5. The consolidated actions, *Wasylec* v. *Stambler*, *Prudential Operating Co., Inc.* v. *Wasylec* and *County Dollar Corporation* v. *Empire Park, Inc.*, were tried before Mr. Justice John J. Dillon (a defendant herein), in the Supreme Court, Westchester County, for approximately nine days, and resulted in a judgment entered in the County Clerk's Office on April 22nd 1965, which judgment determined title to a tract of real property located in Westchester County, and in addition thereto granted judgment for $15,706.30 to Peter Wasylec against the

Affidavit of Leonard A. Weiss, Annexed to Foregoing Notice of Motion

defendants, Saul Stambler, Rose Stambler, Prudential Operating Co., Inc. and Empire Park, Inc.

6. The Court will note that neither your deponent nor his law partner, David Avstreih, were parties in such Supreme Court action but merely represented, as attorneys, Peter Wasylec and Cross-Thru Corporation, a corporation solely owned and controlled by Peter Wasylec.

7. The summons and complaint in the within action were served upon the defendants, Peter Wasylec, David Avstreih and Leonard Weiss on February 5th, 1968. The complaint, in effect, represents a broadside attack on the proceedings, trial, decision and judgment entered as a result of the trial that took place in the Supreme Court, State of New York, County of Westchester.

8. It is most respectfully pointed out to this Court that the complaint in the within action fails to set forth that the judgment entered on April 22nd, 1965 was unanimously affirmed on appeal by the defendants in that action (the plaintiffs herein) to the Appellate Division of the Supreme Court, Second Judicial Department, by its order dated and entered on June 12th, 1967. The complaint likewise fails to state that the appeal from such judgment of affirmance to the Court of Appeals of the State of New York was dismissed by order of the Court of Appeals dated November 2nd, 1967 "upon the ground that no constitutional question is involved". The notice of appeal from the New York Supreme Court, Appellate Division, Second Department, relied "solely upon the questions directly involving the provisions of Article 1,

Affidavit of Leonard A. Weiss, Annexed to Foregoing Notice of Motion

Sections 1, 5, 6, 7 and 11 of the Constitution of the State of New York and Amendment Fifth, Thirteenth and Fourteenth, Section 1 of the Constitution of the United States and Title 42, Section 1994 of the United States Code".

9. The separate answer of the defendant, Peter Wasylee, as well as a separate answer on behalf of the defendants, David Avstreih and Leonard Weiss, were forwarded to the attorney for the plaintiffs herein on February 27th, 1967, the originals thereof, together with affidavit of service being simultaneously filed with this Court.

10. The answer of such defendants consists of generally denying the allegations of the complaint and sets forth four affirmative defenses. Such affirmative defenses consist of the following:

(a) Lack of jurisdiction based upon no federal jurisdiction.

(b) Lack of jurisdiction over the persons.

(c) Res adjudicata.

(d) Failure to state a cause of action.

11. The within action purports to be based on "Title 28 U. S. C., Sections 1331, 1332 and 1343; Title 42 U. S. C., Sections 1981, 1982, 1983, 1985, 1986, 1994, 2201 and 2202", as well as "The Constitution of the United States and in particular, the Fifth, Sixth, Seventh, Eighth, Thirteenth and Fourteenth Amendments thereto".

Affidavit of Leonard A. Weiss, Annexed to Foregoing Notice of Motion

12. In other words, the plaintiffs herein (as defendants in the Supreme Court) are raising substantially the same "constitutional questions" that heretofore have been raised in the Supreme Court, as a result of which the Court of Appeals of the State of New York dismissed the complaint "upon the ground that no constitutional question is involved".

13. That there have been numerous motions and decisions involved in this action to date, all of which are on file in this Court.

14. Judge McGohey by order with opinion filed July 13th, 1968, directed summary judgment for the defendant, Mr. Justice Dillon.

15. Judge Tenney by order with opinion filed October 7th, 1968, granted a motion by plaintiffs to amend the judgment entered on the order of Judge McGohey and for leave to serve an amended complaint.

16. Judge Wyatt by order with opinion filed November 8th, 1968, considered an application by the plaintiffs for an order directing one of the named defendants, Honorable John J. Dillon, a Justice of the Supreme Court of the State of New York, to appear for the taking of his deposition on oral examination. The application was denied and Judge Wyatt said:

> "The present application is totally lacking in merit and is denied."

Judge Wyatt also remarked:

> "The explanation made above establishes that such motions as the present are harassment to all those

Affidavit of Leonard A. Weiss, Annexed to Foregoing Notice of Motion

concerned. The plaintiffs are taking the time of judges of this court to deal with essentially frivolous matters to the prejudice of other litigants in this court. Plaintiffs are strongly advised to desist in such conduct. Continuance can only lead to the imposition of sanctions or the entry of an injunction against plaintiffs or both."

17. Thereafter, the plaintiffs, prepared, filed and served a notice of appeal dated November 29th, 1968, appealing to the United States Court of Appeals for the Second Circuit from the order and opinion denying the motion for an order to examine the defendant, Dillon, the same being the order referred to above as having been rendered by Judge Wyatt.

18. Thereafter, the plaintiffs prepared, filed and served what purported to be an amended complaint in this action, the same having been received by your deponent's firm on December 5th, 1968.

19. While the amended complaint is inartfully drawn, such amended complaint appears to allege that the defendants corruptly conspired in the State Court action with Mr. Justice Dillon before whom said consolidated actions were tried to obtain an improper judgment which violated plaintiffs' civil and constitutional rights and the Constitution of the United States.

20. The amended answers of the defendants, Peter Wasylec, David Avstreih and Leonard Weiss were prepared, filed and served on December 9th, 1968. Such amended answers consist of generally denying the alle-

gations of the complaint and set forth four affirmative defenses. Such affirmative defenses consist of the following:

(a) Lack of jurisdiction based upon no federal jurisdiction.

(b) Lack of jurisdiction over the persons.

(c) Res adjudicata.

(d) Failure to state a cause of action.

21. In reviewing the amended complaint, one must bear in mind that a number of decisions have already been rendered directed to the original complaint as well as other matters involved herein. Judge McGohey by order with opinion filed July 13th, 1968, directed summary judgment on behalf of Mr. Justice John J. Dillon. Judge Tenney by order with opinion filed October 7th, 1968, granted a motion by plaintiffs to amend the judgment entered on the order of Judge McGohey and for leave to serve an amended complaint. In such order Judge Tenney granted the motion to dismiss the complaint as to the corporate plaintiffs on the ground that such corporate plaintiffs were not now represented by attorneys, such dismissal being without prejudice to their rnewal at such time as said corporations were properly represented in this court. Despite this finding and admonition, and despite the fact that such corporate plaintiffs are not represented by attorneys, the amended complaint nevertheless requests relief on behalf of the corporate plaintiffs.

22. In permitting the individual plaintiffs to file an amended complaint, Judge Tenney said:

Affidavit of Leonard A. Weiss, Annexed to Foregoing Notice of Motion

> ". . . that this is the first such motion brought before this court . . ."

and indicated his thought that the individual plaintiffs should have additional opportunity to allege:

> ". . . with at least some degree of particularity overt acts which the defendants engaged in which were reasonably related to the promotion of the claimed conspiracy."

However, the amended complaint is simply a rehashing of the original complaint and does not contain one factual allegation to support the plaintiffs' claims. There are no facts alleged in the amended complaint to support the pleading and plaintiffs in this action can, in fact, supply no facts to support it.

23. It is also to be noted that Judge Wyatt by order with opinion filed November 8th, 1968, aptly characterized the nature of all of the proceedings taken herein by the individual plaintiffs to date.

LEONARD A. WEISS

Sworn to before me this
19th day of December, 1968

LOUIS J. MARTINO
Notary Public, State of New York
No. 60-2563300
Qualified in Westchester County
Commission Expires March 30, 1971

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Supreme Court, U.S.
FILED
JAN 13 1971
E. ROBERT SEAVER, CLERK

In the

Supreme Court of the United States

October Term, 1970.

No. 1146.

SAUL STAMBLER and ROSE STAMBLER, individually, and SAUL STAMBLER on behalf of Personal Operation Co., Inc., and Enrum Park Inc., and ROSE STAMBLER on behalf of Enrum Park Inc. (a defunct corporation),

Petitioners,

against

JOHN J. DILLON, TITLE GUARANTEE CO., COUNTY DOLLAR CORPORATION, JOHN C. O'MALLEY, PETER WASYLEC, DAVID AVSTREIH, LEONARD WEISS, MARCY FINKE, GEORGE B. GORDON,

Respondents.

Brief and Appendix of the Title Guarantee Company, John C. O'Malley and County Dollar Corporation in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

JOHN J. BOYLE,
Attorney for Respondents, Title Guarantee Company, John C. O'Malley and County Dollar Corporation,
120 Broadway,
New York, N. Y. 10005
212 CO 7-2231.

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In the

Supreme Court of the United States

October Term, 1970

Docket No. 1140

SAUL STAMBLER and ROSE STAMBLER, individually and SAUL STAMBLER on behalf of Prudential Operating Co., Inc. and Empire Pool, Inc., and ROSE STAMBLER on behalf of Empire Park, Inc. (a defunct corporation),

Petitioners,

against

JOSEPH J. DUGGAN, TITLE GUARANTEE CO., COUNTY DOLLAR CORPORATION, JOHN C. O'MALLEY, PETER WASSERS, DAVID AVSTREICH, LEONARD WEISS, MURRAY FISHEL, GEORGE B. GORDON,

Respondents.

Brief on Behalf of Defendants-Respondents, The Title Guarantee Company, John C. O'Malley and County Dollar Corporation in Opposition to an Application for a Writ of Certiorari.

Statement.

This is an application for a writ of certiorari by the plaintiffs Stambler. They desire to appeal from:

1. A judgment of Hon. William B. Herlands, United States District Judge entered June 23, 1969, dismissing plaintiffs' amended complaint for failure to state a cause of action against any of the defendants (B.5)*;

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*Letters and numbers in parentheses are to pages of Petitioners' Appendix and Respondents' Appendix hereto annexed except as otherwise noted.

2. An order of Hon. Inzer B. Wyatt, United States District Judge dated October 24, 1963, denying plaintiffs' motion to amend Judge Herlands' judgment of June 28, 1963, to permit the service by plaintiffs of a second amended complaint. (R 133);

3. An order of Hon. Inzer B. Wyatt, United States District Judge, dated December 1, 1963, denying plaintiffs' motion to re-argue the motion for leave to serve a second amended complaint; and,

4. An order and judgment of the United States Court of Appeals, Second Circuit, affirming the judgment of dismissal of Judge Herlands and post judgment orders (R 138).

Issues Presented Herein.

1. Does plaintiffs' amended complaint state a claim against defendants upon which relief can be granted?

2. On the record before the Court are plaintiffs entitled to leave to serve a second amended complaint herein?

3. On the record before the Court are the defendants, The Title Guarantee Company, John C. O'Malley and County Dollar Corporation, entitled to summary judgment dismissing plaintiffs' amended complaint on the merits?

4. Does the Court have subject matter jurisdiction herein?

5. Does the Court have in personam jurisdiction herein?

Statement of the Case.

It seems to appear from the amended complaint in this action (C-1) that it is brought to recover a judgment (a) declaring that the Judgment entered April 22, 1963

in the Supreme Court, Westchester County, New York, in the actions of Wasylee v. Stambler (Action No. 1), Prudential v. Wasylee (Action No. 2), and County Dollar Corporation v. Empire Park, Inc. (Action No. 3) enumerated in Exhibit 1 (C 53) annexed to answer herein (C 46) of defendants, The Title Guarantee Company, John C. O'Malley and County Dollar Corporation, to be a nullity; (b) for a permanent injunction enjoining the enforcement of the State Court's judgment; and (c) for the recovery of astronominal damages against all of the defendants.

As far as can be ascertained from the allegations of the amended complaint (C 1) the basis for such relief is that the defendants corruptly conspired in the State Court actions in the Supreme Court, Westchester County with Mr. Justice John J. Dillon, before whom said consolidated actions were tried, to obtain an improper judgment, which violated plaintiffs' civil and constitutional rights under Title 28 U.S.C. Sections 1331, 1332, 1343, 2201 and 2202; Title 42 U.S.C. Sections 1981, 1982, 1983, 1985, 1986 and 1994, and the Constitution of the United States, in particular, Article 1 Section 10 and also under the Fifth, Sixth, Thirteenth and Fourteenth Amendments thereto.

There is no merit to plaintiffs' claims herein. The facts showing the lack of merit are fully and completely set forth in the affidavits of John C. O'Malley and Herman Berniker, sworn to December 12, 1968 (4a and 23a) submitted in support of the motion for summary judgment and other relief returnable January 14th, 1969, made by The Title Guarantee Company, John C. O'Malley and County Dollar Corporation (1a). For such reason said facts are not set forth here for a second time and reference is hereby made to the aforesaid affidavits and Exhibits therein referred to for a detailed analysis of what

transpired in the proceedings in the State Court that purportedly are plaintiffs' basis for this action and application.

With these facts in mind, it is clear that plaintiffs have failed to state in their amended complaint and in fact have no cause of action in the United States Courts against the defendants in this action.

POINT I.

The present application for a writ of certiorari does not come within the purview of Rule 19 of this court.

POINT II.

The amended complaint does not state a cause of action against any of the defendants.

Judge Herlands in his opinion (R-5) dismissing plaintiffs' amended complaint, analyzed said complaint in detail and applied and set forth in full all applicable authorities showing that said complaint failed to state a claim against any of the defendants.

It would serve no useful purpose here to burden this Court with a re-analysis of said complaint and a restatement and re-application of the controlling authorities relied upon and set forth by Judge Herlands in his opinion.

It is submitted for the reasons and upon the law set forth in Judge Herlands opinion (R-5) that plaintiffs' amended complaint was properly dismissed for failing to state a cause of action against the defendants.

POINT III.

Plaintiffs' application to amend Judge Herlands opinion and judgment entered June 23, 1969, so as to permit the service of a second amended complaint, was properly denied on the facts and the law.

Plaintiffs' motion to amend Judge Herlands opinion and judgment of June 23, 1969 was pending before Judge Herlands at the time of his death. The motion was properly denied by Judge Wyatt, to whom it was referred by order of the Chief District Judge.

In denying this motion Judge Wyatt reviewed all of the proceedings before Judge Herlands as well as before the other judges of this Court. His opinion (B-13) makes this clear. After such review he concluded (B-18):

> "The present motion is supported only by arguments already rejected by Judge Herlands.
> The motion is denied on the law and in the exercise of discretion."

Judge Wyatt's conclusion is amply supported by the facts. Plaintiffs' motion for leave to amend Judge Herlands' judgment and for permission to serve a third complaint was brought on solely by notice of motion dated June 30, 1969. The notice of motion is not supported by an affidavit or any factual showing of any kind, that plaintiffs, if given an opportunity, were able to state a claim against defendants in a second amended complaint. Plaintiffs have never stated facts or attempted to state facts showing that they have a claim to be alleged in a second amended complaint. Absent such showing, they are not entitled to any further leave to amend.

Under such circumstances plaintiffs do not bring themselves within the ruling of *Foman v. Davis*, 371 U. S. 178 (1962), 9 L. Ed. 2d 222, on which they relied below. In

stead they fall squarely within the provisions of such decision prohibiting the granting of leave to further amend in a case like this. Here it is apparent that the application is made in bad faith after repeated failure to cure obvious deficiencies and, where permission to amend would be futile as the record here shows, and would cause defendants undue prejudice. In *Foman v. Davis* (371 U. S. 178), the Court said at page 182 of its opinion:

> "In the absence of any apparent or declared reason—such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, *futility of amendment, etc.*—the leave sought should, as the rules require be 'freely given.'" (Italics added.)

Petitioners have not shown here that they can state facts in a second amended complaint establishing the purported conspiracy which they claim. The futility of permitting further amendment is shown by this brief and the affidavit of John C. O'Malley (4a). The District Court was therefore right in denying further leave to amend on the facts of this case. Therefore, its ruling should not be disturbed, and certiorari should be denied. This is inherent in the ruling in *Foman v. Davis*, (371 U. S. 178) where the court said at page 182 of its opinion:

> "Of course, the grant or denial of an opportunity to amend is within the discretion of the District Court, but outright refusal to grant the leave *without any justifying reason appearing for the denial is not in exercise of discretion;* it is merely abuse of that discretion and inconsistent with the spirit of the Federal Rules." (Emphasis added.)

The justifying reasons for denying plaintiffs leave to further amend were clearly stated by Judge Herlands in

his decision and judgment of June 23, 1969 (B-5). He said (B-12):

> "Plaintiffs' suit is unfounded and has probably been maintained in bad faith. Plaintiffs accuse defendants with participation in a fraud and conspiracy but have submitted an amended complaint which in no way sets forth in a legally sufficient manner the existence of any wrongdoing on the part of defendants despite the fact that leave had been granted for amendment of the original complaint *to supply that deficiency. Plaintiffs were apparently fully aware that they had no facts with which they could support their reckless accusations.*" (Emphasis added.)

Referring to Judge Tenney's order granting plaintiffs leave to file an amended complaint, Judge Herlands said (B-12):

> "Although plaintiffs' action *may very well in fact have been frivolous and vexatious*, a district judge applying the rules of procedure, granted plaintiffs leave to file an amended complaint. Where this is done, it would be unfair to penalize a litigant by taxing him with attorneys' fees whenever the amended complaint fails to withstand a motion to dismiss for failure to state a claim. *Although this litigation is indeed baseless*, it has not been so unconscionably oppressive and harassing to warrant the harsh sanctions sought by defendants." (Italics added.)

The foregoing constitute ample grounds under *Foman v. Davis, (supra)*, to deny plaintiffs leave to further amend herein and plaintiffs' motion for such relief and to re-argue were properly denied.

POINT IV.

On the record herein defendants are entitled to summary judgment dismissing plaintiffs' amended complaint on the merits and it clearly appears therefrom that plaintiffs cannot state a cause of action against defendants.

The application resulting in Judge Herlands' opinion and judgment entered June 23, 1969 dismissing plaintiffs' complaint was initiated by notice of motion of the defendants, The Title Guarantee Company, John C. O'Malley and County Dollar Corporation dated December 12, 1968 (1a), and the supporting affidavits of John C. O'Malley and Herman Berniker both verified December 12, 1968, (4a, 23a) asking for summary judgment against plaintiffs on the merits and for other relief. The notice of motion and supporting papers were served on plaintiffs on December 12, 1968 and were returnable in the District Court on January 14, 1969. Notwithstanding this long notice of motion, plaintiffs elected not to submit a single paper in opposition to said motion for summary judgment on the merits. Instead they filed a frivolous affidavit imputing prejudice to Judge Herlands.

The said motion papers factually show that there was no conspiracy between the defendants to deprive plaintiffs of any of their rights, civil, constitutional or otherwise. Exhibits 2, 3 and 4 made a part of the motion papers and consisting of the record and briefs in the State Court action in the Appellate Division of the Supreme Court also factually demonstrates that plaintiffs had a fair trial before Judge Dillon and that there was no conspiracy of any kind to deprive plaintiffs of their rights. This factual proof is nowheres contraverted or denied. It stands admitted in the record herein, and entitles defendants, The Title Guarantee Company, John C. O'Malley and County Dollar Corporation, to summary judgment

herein dismissing plaintiffs' amended complaint on the merits. It further shows that plaintiffs cannot state a claim against defendants, and it would be futile to permit further amendment.

POINT V.

No federal question conferring jurisdiction on the Federal Court is involved in this action.

The amended complaint alleges in paragraph "First" thereof (C-1):

> "First: The jurisdiction of this Court over this complaint arises under Title 28 U.S.C., Sections 1331, 1332 and 1343, 2201 and 2202; Title 42 U.S.C., Sections 1981, 1982, 1983, 1985, 1986, 1994; the Constitution of the United States and in particular, Article 1, Sec. 10, and the Fifth, Sixth, Thirteenth and Fourteenth Amendments, thereto."

Judge Herlands in his opinion dismissing the amended complaint (B-5) analyzed the complaint with respect to each of the foregoing sections and the foregoing provisions of the Constitution. He demonstrated both factually and as a matter of law clearly and convincingly that none of such sections and provisions had any application here. This took all possible federal questions out of the case.

It clearly appears from defendants' motion papers (4a, 23a), exhibits and the amended complaint and answer (C-46) that the consolidated actions in the State Court did not arise under the Constitution or any of the laws of the United States. It involved only a determination of title to a gore strip of real property in Westchester County and the right of Wasylee in that action to recover back from the Stamblers and their corpo-

rations on the ground of fraud, the purchase price paid by Wasylec for a conveyance by Prudential Operating Co., Inc. of a portion of said gore strip.

The present action in this Court is solely to relitigate the very issues litigated in the State Court. Jurisdiction to do this cannot be conferred on the Federal Courts by the bald statements made in the amended complaint that plaintiffs' constitutional and civil rights were violated in the trial of the State Court action.

> 1 U.S.C.A. Title 28, Section 1331;
> *Morgan v. Sylvester*, 125 F. Supp. 380 (S. D. N. Y. 1954); aff'd 220 F. 2d 758 (2d Cir. 1955), cert. den. 350 U. S. 867;
> *Wells v. Universals Pictures Co.*, 166 Fed. Rep. 2d 620 (CCA 2d 1948), 621, 622;
> *Powell v. Workmens' Compensation Board of State of New York*, 327 F. 2d 131, 137-138;
> *Jemzura v. Belden*, 281 F. Supp. 200, at 206;
> *Pierson v. Ray*, 386 U. S. 547.

In *Morgan v. Sylvester (supra)*, decided by Judge Weinfeld, the Court said at page 387 of its opinion:

> "This action is a clear attempt, despite plaintiff's assertion to the contrary, to obtain a review and a retrial of the State Court proceedings. The fact that a defeated litigant is prepared to charge a 'conspiracy' recklessly or otherwise or recite *in haec verba* the language of the Civil Rights Act does not give a right of review in the Federal Courts. To uphold the claim here advanced upon such conclusory allegations 'would open the door wide to every aggrieved litigant in a state court proceedings, and set the federal courts up as an arbiter of the correctness of every state decision.'"

The Federal Courts, therefore, do not have subject matter jurisdiction of this action.

POINT VI.

The plaintiffs and all of the defendants are not citizens of different states; therefore the Federal Courts do not have jurisdiction of this action on the grounds of diversity of citizenship.

The amended complaint in this action, paragraph "Second: (a) 1, 2(b) 1-9," (C-1), shows that all of the plaintiffs and, all of the defendants are citizens of the State of New York except the defendant Gordon, a citizen of New Jersey.

The fact that defendant Gordon is a citizen of New Jersey does not confer jurisdiction of this action on the Federal Courts on the ground of diversity of citizenship.

U.S.C.A. Title 28, Section 1332;
Carl Gutmann & Co. v. Rohrer Knitting Mills, 9 F. R. D. 67;
Baltimore & Ohio Railroad Co. v. City of Parkersburg, 268 U. S. 35, 38, 69 L. Ed. 834;
Schuckman v. Rubenstein, 164 F. 2d 952, 955 (CCA 6—1947);
Wells v. Universal Pictures Co., 166 F. 2d 690, 691 (CCA 2d—1948).

In *Carl Gutmann & Co. v. Rohrer Knitting Mills (supra)* the Court said at page 68 of its opinion:

> "As to the fourth cause of action based upon conspiracy, there is a further difficulty. The only ground of jurisdiction here is diversity of citizenship. The complaint shows that the plaintiff and one of the defendants (Warr-Ell Mills, Inc.) are both corporations of and doing business in the State of New York. Where, as here, the plaintiff and one of the defendants are citizens of the same State, the Federal District Court is without jurisdiction. *Shuckman v. Rubenstein*, 6 Cir., 164 F. 2d 952; *Wells v. Universal Pictures Co.*, 2 Cir., 166 F. 2d 690."

Therefore the Federal Courts do not have jurisdiction of this action and the complaint should be dismissed.

CONCLUSION:

For all the foregoing reasons the judgment dismissing plaintiffs' amended complaint and the post judgment orders were correct and certiorari should be denied.

Respectfully submitted,

JOHN J. BOYLE,
Attorney for Respondents The Title Guarantee Company, John C. O'Malley and County Dollar Corporation,
120 Broadway,
New York, N. Y. 10005
212 CO 7-2231.

APPENDIX.

Notice of Motion.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

SAUL STAMBLER and ROSE STAMBLER, individually and SAUL STAMBLER on behalf of Prudential Operating Co., Inc., and Empire Park, Inc., and ROSE STAMBLER on behalf of Empire Park, Inc. (a defunct corporation),

Plaintiffs,

against

JOHN J. DILLON, TITLE GUARANTEE CO., COUNTY DOLLAR CORPORATION, JOHN C. O'MALLEY, PETER WASYLEC, DAVID AUSTREIH, LEONARD WEISS, MARCY FINKE, GEORGE B. GORDON,

Defendants.

SIRS:

Please Take Notice, that upon the amended complaint of plaintiffs, the affidavit of John C. O'Malley, sworn to December 12th, 1968, the affidavit of Herman Berniker, sworn to December 12th, 1968, and upon Exhibits 1, 2, 3, 4, 5 and 6 submitted to the Court herewith, and upon all papers, pleadings and proceedings heretofore had in the above entitled action, the undersigned will duly move this Court at a Term for Motions thereof to be held in the United States Court House, Room 506, Foley Square, Borough of Manhattan, City and State of New York, on the 14th day of January, 1969, at 10 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard for: (1) summary judgment against the plaintiffs and in favor of the defendants, The Title Guarantee Com-

pany, John C. O'Malley and County Dollar Corporation, dismissing plaintiffs' amended complaint on the merits; (2) dismissing plaintiffs' amended complaint on the further ground that the facts pleaded in said complaint fail to state a claim for relief; (3) dismissing said amended complaint on the further ground that this Court does not have jurisdiction of the subject matter of the action and that the judgment of the State Court sought to be vacated and set aside is *res adjudicata* and not subject to review, stay, modification or vacatur by this Court; (4) dismissing said amended complaint on the further ground that the Court does not have jurisdiction of the parties to this action by reason of want of diversity of citizenship; (5) enjoining the plaintiffs from further proceeding with this action and the imposition of sanctions against them, and (6) for such other, further and different relief as to this Court seems just and equitable.

Dated: December 12th, 1968.

Yours, etc.

JOHN J. BOYLE,
Attorney for Defendants, The Title Guarantee Company, John C. O'Malley and County Dollar Corporation
Office & P. O. Address
120 Broadway
New York, N. Y. 10005
Telephone: 212 CO 7-2231

Notice of Motion

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Rene Harry Karsten, Esq.
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Affidavit of John C. O'Malley in Support of Motion.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

SAUL STAMBLER and ROSE STAMBLER, individually and SAUL STAMBLER on behalf of Prudential Operating Co., Inc., and Empire Park, Inc., and ROSE STAMBLER on behalf of Empire Park, Inc. (a defunct corporation),

Plaintiffs,

against

JOHN J. DILLON, TITLE GUARANTEE CO., COUNTY DOLLAR CORPORATION, JOHN C. O'MALLEY, PETER WASYLEC, DAVID AVSTREIH, LEONARD WEISS, MARCY FINKE, GEORGE B. GORDON,

Defendants.

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State of New York,
County of New York, ss:

JOHN C. O'MALLEY, being duly sworn, deposes and says:

I am an attorney-at-law and a member of the law firm of O'Malley & Boyle, with offices at 120 Broadway, New York, N. Y. 10005, and I make this affidavit in support of this motion for summary judgment herein and a dismissal of the amended complaint on all of the grounds set forth in the answer of defendants, The Title Guarantee Company, John C. O'Malley and County Dollar Corporation, to the said amended complaint.

I am one of the defendants in the above entitled action and I am fully familiar with said action and with the pleadings and proceedings heretofore had therein. It appears from the amended complaint in this action that it is brought to recover a judgment (a) declaring the State

Court actions of Wasylee v. Stambler (Action #1), Prudential v. Wasylee (Action #2), and County Dollar Corporation v. Empire Park, Inc. (Action #3) enumerated in Exhibit 1 hereto annexed a nullity; (b) for a permanent injunction enjoining the enforcement of the State Court's judgment; and (c) for the recovery of astronomical damages against all of the defendants.

As far as can be ascertained from the allegations of the amended complaint the basis for such relief is that the defendants corruptly conspired in the State Court actions with Mr. Justice Dillon, before whom said consolidated actions were tried, to obtain an improper judgment, which violated plaintiffs' civil and constitutional rights under Title 28 U. S. C. Section 1331, 1332, 1343, 2201 and 2202; Title 42 U. S. C. Sections 1981, 1982, 1983, 1985, 1986 and 1994, and the Constitution of the United States, in particular, Article 1 Section 10 and the Fifth, Sixth, Thirteenth and Fourteenth Amendments thereto.

There is no merit to plaintiffs' claims herein or any facts to support such claims.

I am fully familiar with the consolidated actions of Wasylee v. Stambler, Prudential Operating Co., Inc. v. Wasylee and County Dollar Corporation v. Empire Park enumerated in Exhibit 1, having tried said actions in the Supreme Court, Westchester County and handled the appeals therein in the Appellate Division and in the Court of Appeals for the defendants, County Dollar Corporation and New England Mutual Life Insurance Company.

The consolidated actions Wasylee v. Stambler, Prudential Operating Co., Inc. v. Wasylee, and County Dollar Corporation v. Empire Park, Inc., were tried before Mr. Justice John J. Dillon in the Supreme Court, Westchester County for approximately nine days and resulted in a judgment entered in the Westchester County Clerk's Office on April 22, 1965, determining title to a gore tract of real property located in Westchester County adversely

to plaintiffs and in addition thereto granting judgment for $15,106.30 to Peter Wasylee against Saul Stambler, Rose Stambler, Prudential Operating Co., Inc. and Empire Park, Inc. This judgment was unanimously affirmed by the Appellate Division of the Supreme Court, Second Judicial Department, by its order entered June 12, 1967 and the appeal therefrom to the Court of Appeals on constitutional grounds was dismissed by that Court's order entered on November 2, 1967 "upon the ground that no constitutional question is involved".

There will be submitted to the Court on the argument of this motion the Record On Appeal in said consolidated State Court actions in the Appellate Division, marked Exhibit 2, the Stambler group brief, marked Exhibit 3, and the brief of County Dollar Corporation to the Appellate Division, marked Exhibit 4. Said Record on Appeal contains a complete transcript of the proceedings before Mr. Justice Dillon, the pleadings, the decision and the judgment of the State Court in the consolidated actions.

Saul Stambler, Rose Stambler, Prudential Operating Co., Inc. and both the Empire Parks Inc. were represented from the very inception of said State Court actions by Leon J. Greenspan, Esq., of White Plains, New York. On the trial before Judge Dillon, Prudential Operating Co., Inc. and Empire Park, Inc. were represented by Hyman Hecker, Esq. of counsel of White Plains, and the Stamblers were represented on said trial by Leon J. Greenspan, Esq. On the appeal to the Appellate Division Mr. Greenspan continued to represent the Stamblers and Hyman Hecker represented the Empire Parks up to the actual call of the appeal for argument before the Appellate Division on May 4, 1966 when Mr. Greenspan withdrew because of derogatory remarks made about him in a reply brief filed purportedly without his knowledge by Mr. Stambler. The appeal was then adjourned to permit Mr. Stambler to obtain other counsel. There-

after, Rene H. Kursten appeared on said appeal for the Stumblers, the Empire Parks and Prudential (the plaintiffs in this action). Mr. Kursten continued to represent all of said parties until the final disposition of the actions by the dismissal of the appeal in the Court of Appeals on November 2nd, 1967.

Saul Stumbler took an active part in all of the State Court ligitation. He appeared in court on the argument of almost all the pre trial motions and calendar calls, he attended most of the examinations before trial at which approximately 658 pages of testimony were taken. Stumbler's examination alone covered 285 pages of testimony. He was present throughout the trial and continually conferred with and advised his attorneys, Mr. Greenspan and Mr. Hecker. He also appeared in the Appellate Division.

Not once at any time either during the trials or appeals did he raise any question of a conspiracy between Judge Dillon and the other defendants in this action to obtain a corrupt judgment on the trial of the State Court actions in contravention of his civil and constitutional rights. Only after he had exhausted without success all actions and appeals in the State Courts did he come forward with the conspiracy charge set forth in the original complaint in this action claiming a violation of the civil and constitutional rights of the plaintiffs.

The State Court Actions

Action #1, Peter Wasylee v. Saul Stumbler, *et al.*, (Ex. 1), originally was brought to recover back the sum of $15,000 from Saul Stumbler, Rose Stumbler, Jack Jacobs and Prudential Operating Co., Inc. which sum had been paid by Wasylee to the Prudential on June 26th, 1961 for a gore piece of property purportedly running through the property owned by Wasylee. (Stumbler and his group controlled Prudential). The complaint in action #1 was

thereafter amended to bring in the Finke Group of defendants. The amended complaint (appearing at page 24 in Volume 1 of Ex. 2) in addition to seeking to recover the $15,000 from Prudential asked that Empire Park, Inc., if it were successful in establishing title to the gore strip through County Dollar's property in the County Dollar action be adjudged to hold title thereto in trust for Wasylee and that Empire Park be directed to convey it to Wasylee and for other relief.

Action #2, Prudential Operating Co., Inc. v. Peter Wasylee, (Ex. 1), was brought to rescind the conveyance of the gore area purportedly running through the Wasylee property which Wasylee had purchased for $15,000 from Prudential and which Wasylee was suing to recover in action #1. Prudential also asked (in Action #2) to have set aside a simultaneous conveyance by Wasylee of the gore area and other property to the defendants S. & H. Building Corp. on June 26th, 1961 and to have declared void a mortgage thereon held by the defendant New England Mutual Life Insurance Company and also for an accounting of the rents, issues and profits of said gore strip and other relief. The complaint in said action appears at page 83 of Volume 1 of Exhibit 2.

Action #3, County Dollar Corp. vs. Empire Park, Inc. and Peter Wasylee, (Ex. 1), was originally brought only against Empire Park, Inc., the purported record owner and also claimed owner of the purported gore area where it ran through County Dollar's Cross County Center property. The action was brought under Article 15 of the Real Property Law to bar all claims of Empire Park, in and to any part of County Dollar's property. After Wasylee amended his complaint in action #1 claiming that Empire Park, Inc. held the gore strip of property including the portion through County Dollar's property in trust for him, County Dollar amended its complaint to bring Wasylee into action #3 and to bar his purported claim against County Dollar's property that he alleged in

the amended complaint in action #1. County Dollar's amended complaint appears at page 116 of Volume 1 of Exhibit 2. Both Wasylee and Empire Park counterclaimed against County Dollar claiming ownership of the gore area where it purportedly ran through County Dollar's property.

The aforesaid facts cannot be successfully controverted. They are established by the pleadings and minutes of the trial of the consolidated actions before Judge Dillon contained in Exhibit 2 submitted to the court herewith. Said Exhibit 2 further conclusively establishes that (1) that no constitutional question and no law of the United States was in any way involved in said consolidated actions; (2) that all of said actions involved the common question of the existence and the ownership of the purported gore area running through the Wasylee and the County Dollars properties; and (3) the right of Wasylee to recover the $15,000 paid to Prudential for a portion of said gore area and (4) the further right of Wasylee to a judgment that the Stambler group held the balance of said gore area in trust for Wasylee.

The Consolidation of the State Court Actions

The State Court actions 1, 2 and 3 (Ex. 1) were consolidated after motions duly made in open court. They were properly consolidated as the issues in all actions revolved around the existence and the title of the gore area and as to who was the true owner of the various parts thereof, issues common to all actions.

Setting the State Court Actions Down For Trial

By order to show cause returnable June 5, 1964 County Dollar Corporation moved to strike the County Dollar action #3 (Ex. 1) from the calendar on the ground that it had been improperly placed on said calendar before a pretrial proceedings had been completed. As a result of

this motion Hon. Gerald Nolan, Justice of the Supreme Court, directed that said action be placed on the September 1964 calendar of Special Term, Part II of the Westchester County Supreme Court for trial. Actions 1 and 2 (Ex. 1) having been consolidated with the County Dollar action #3, therefore, came on for trial with the County Dollar action on the call of the calendar on September 17th, 1964. The reason the action was tried before Judge Dillon was that he was assigned to Special Term, Part II for September 1964 Term and when the case was called for trial all counsel in actions 1, 2 and 3 answered "ready".

The Trial Before Judge Dillon

The minutes of the trial before Judge Dillon are set forth in Volumes 2, 3 and 4 of Exhibit 2. An examination of this transcript as well as the foregoing facts shows:

(1) That Judge Dillon had full and complete jurisdiction as a Justice of the New York Supreme Court to try and decide all of the issues presented by the pleadings, to wit: (a) the title to the purported gore strip of real property in Westchester County, New York, (b) the rights of the parties to a money judgment against one another, and (c) whether the Stambler group of defendants held title to the purported gore strip of property in trust for Wasylee.

Under such circumstances Judge Dillon had the jurisdiction and the right to make the decision he did and to grant the relief that he granted. Judge Wyatt of this Court in his decision filed in this action on November 8, 1968 has so ruled. He said:

> "The New York Supreme Court, by the Constitution of the State (Art. 6 §1) has 'general jurisdiction in law and equity'. It is thus impossible

for Mr. Justice Dillon with reference to a lawsuit in his court to act in excess of his jurisdiction."

(2) The pleadings and minutes, Exhibit 2, further show that no constitutional question or any question under the laws of the United States were presented for decision in said actions. In fact, plaintiffs in their 47 page brief submitted to Judge Dillon after trial raised no such questions. In the Appellate Division plaintiffs for the first time urged constitutional questions (see plaintiffs-Appellants brief marked Exhibit 3 submitted to the court herewith). They raised the same constitutional questions in the Court of Appeals submitting a copy of their Appellate Division brief in opposition to the motion to dismiss and appeal. Both the Appellate Division and the Court of Appeals unanimously found against plaintiffs and no application was ever made to the Supreme Court of the United States for certiorari and the time to do so has now expired. Therefore, such issues cannot be re-litigated herein.

(3) The pleadings and minutes, as well as the aforesaid facts, further show that plaintiffs had a fair and impartial trial before Judge Dillon. Plaintiffs cannot point to a single ruling or determination made by Judge Dillon during the course of the trial that in fact showed bias on his part in favor of the defendants herein or in any way denied plaintiffs a fair and impartial trial. This is particularly so in view of the Appellate Division's unanimous affirmance.

Judge Dillon's Decision

Judge Dillon's decision is set forth at page 13 of Volume 1 of Exhibit 2. The quoted parts therefrom in the amended complaint (paragraphs 18th to 22nd) are no evidence whatsoever of a corrupt conspiracy between the defendants herein and Judge Dillon or of any wrong do-

ing by the defendants or by the Judge. When Judge Dillon's decision is read as a whole the quoted parts thereof appear in proper perspective and shows that the issues presented by the pleadings were justly and correctly decided on the proof adduced at the trial appearing in the transript Exhibit 2. The affirmance by the Appellate Court makes such a conclusion unassailable, these decisions and judgment of the State Courts cannot be reviewed here because of any of the reasons given by plaintiffs in the amended complaint.

The Conspiracy Charged Against the Defendants

The conspiracy charge made in the amended complaint is false and reprehensible. There is not one factual allegation made in the amended complaint to support it. There are no facts to support it and plaintiffs in this action can supply no facts to support it.

The purported acts of conspiracy are supposedly set forth in paragraphs "Third to Twenty-Fifth" of the amended complaint. There is not one wrongful overt act factually alleged in any of said paragraphs. All contain conclusions of the pleader with nothing to support them. Most do not even allege acts of conspiracy or wrong doing. What was said by Justice Herlands about the original complaint in his decision filed herein on March 28, 1968 denying plaintiffs motion for a temporary injunction is equally applicable to the amended complaint. At page 3 of his decision Judge Herlands said:

> "'The fact that a defeated litigant (in a state court proceeding) is prepared to charge a "conspiracy" recklessly or otherwise and recite . . . . the language of the Civil Rights Act does not give a right of review in the Federal Courts.' *Morgan v. Sylvester*, 125 F. Supp. 380, 387 (S.D.N.Y. 1954), *affirmed*, 220 F. 2d 758 (2nd Cir.) (*per curiam*), *cert. denied* 350 U. S. 867 (1955).

Affidavit of John C. O'Malley in Support of Motion

> Plaintiffs' right to the relief prayed for in the complaint 'is shrouded in substantial doubt'. *Garland v. Ruskin*, 249 F. Supp. 977, 980 (S.D.N.Y. 1965). In fact, there is more than a substantial doubt whether there is subject matter jurisdiction and whether plaintiffs have stated a claim upon which relief can be granted."

Judge Herlands further said at page 6 of his decision:

> "Additional Conclusions
>
> 1. There is no evidence of any violation of any civil rights statutes, e. g., 42 U.S.C. §§ 1981, 1982, 1983, 1985, 1994; nor is there any evidence of any violation of any federal constitutional provision, e. g., the Fifth, Sixth, Seventh, Eighth, Thirteenth and Fourteenth Amendments."

There is clearly nothing pleaded in the amended complaint showing violation of any of the civil rights statutes or constitutional provisions by any of the defendants or any conspiracy by any of the defendants to deprive plaintiffs of their civil or constitutional rights. In this aspect of the amended complaint what was said by Judge McGohey in his decision filed herein on July 13, 1968 granting summary judgment dismissing the original complaint of plaintiffs against Judge Dillon is applicable to the amended complaint and to all of the defendants. At page 7 of his decision Judge McGohey said:

> "Sections 1981 and 1982 of Title 42 U.S.C. both provide for equality of rights regardless of color. Here it is neither alleged nor shown that Justice Dillon discriminated against any plaintiff because of color. Accordingly, the complaint fails to state a claim against Justice Dillon on which relief

may be granted under either of these sections.

Section 1986 which grants only an action for damages, likewise affords no basis for a relievable claim since no claim for damages is asserted against Justice Dillon.

There remains to be considered the claimed conspiratorial deprivation of the plaintiffs' rights by Justice Dillon. Whether such a claim may be laid under sections 1983 and 1985 of Title 42 need not be decided here for in any event the complaint fails to allege sufficient facts to show that Justice Dillon was part of any such conspiracy if one existed.[5] The complaint does no more than charge Justice Dillon in the most general terms with participation in the alleged conspiracy. This is not enough.[6] Apart from the allegations which will be considered later that Saul Stambler was 'convicted' and subject to 'involuntary servitude,' the complaint shows only that the judge performed the normal duties of his office in the trial and decision of the issues in a strongly contested litigation.

The claims of 'conviction' and 'involuntary servitude' are, as the complaint on its face shows, frivolous and must be disregarded.[7]

The motion, treated as one for summary judgment, is granted.

I unequivocably swear that there was no conspiracy between the defendants in this action to unjustly de-

[5] *Arnow v. City of Coldspton*, 239 F. 2d 226, 230 (9th Cir. 1957).

[6] *See Powell v. Workmen's Compensation Board of the State of New York*, 327 F. 2d 131, 137 (2 Cir. 1964).

[7] *See Jemzura v. Beldon*, 67 Civ. 347 N.D.N.Y. 1968).

prive the plaintiffs of their civil and constitutional rights in the State Court actions. Except for arguments in open court or in the presence of other counsel, I never discussed the State Court actions or any aspects thereof with Judge Dillon and I never did anything or counseled the doings of any acts which would deprive plaintiffs of their civil or constitutional rights. I defy the plaintiffs to point out any overt act on my part or on the part of any defendant to the contrary. The Record on Appeal in the State Court actions (Ex. 2) conclusively shows that plaintiffs were not deprived of any of their civil or constitutional rights by Judge Dillon or any of the other defendants to this action.

The County Dollar Action Against Empire Park, Inc. Was Not Conspiratorial or Wrongful.

The commencement and maintenance of the County Dollar action against Empire Park, Inc. (Ex. 1) was not an act of conspiracy with the other defendants to deprive plaintiffs of their civil and constitutional rights.

The County Dollar action was commenced because of the conduct of plaintiff Stambler and his attorney Leon J. Greenspan. On July 9, 1962 Mr. Greenspan wrote County Dollar Corporation threatening to erect a fence across the entrance to a service station built upon a portion County Dollar's property. A copy of his letter is hereto annexed and marked Exhibit 5. County Dollar's title to its property had been insured by the title company for $22,500,000. The meeting referred to in paragraph "Thirteenth" of the amended complaint was to forestall the erection of the fence if possible and explore the possibility of settlement of Empire claims against County Dollar. What transpired at said meeting is entirely different from what is alleged in paragraph "Thirteenth" of the amended complaint, as ap-

pears from the affidavit of Herman Berniker hereto annexed.

After said meeting The Title Guarantee Company pursuant to its title policy insuring County Dollar's title retained my firm to bring a bar claim action to protect County Dollar from Stambler's threatened action of erecting a fence and to dispose of his invalid claim against the County Dollar property. When Stambler did try to erect a fence by placing poles in the County Dollar's property on September 14, 1964 (which poles were immediately removed by County Dollar) the County Dollar action was commenced and on due application to the Court Judge Joseph F. Gagliardi issued a temporary injunction restraining Empire Park, Inc. and its representatives from disturbing the *status quo* during the pendency of such action.

The County Dollar action was commenced without consultation with any of the defendants or their counsel all of whom were unknown to me and my firm at that time. Plaintiffs claim that it was brought as a part of a conspiracy to deprive plaintiffs of their civil and constitutional rights is false and has no facts whatsoever to support it. Likewise, plaintiffs claim that defendants, County Dollar Corporation, The Title Guarantee Company and deponent induced plaintiff Wasylee to amend his complaint in action #1 (Ex. 1) to enlarge his claim against plaintiffs is false.

I did not request Mr. Wasylee or his attorneys, Avstreih, Martino & Weiss, Esqs., and I know that County Dollar Corporation and the Title Guarantee Company did not request Mr. Wasylee or his attorneys to amend Wasylee's complaint against Stambler in action #1 (Ex. 1), to include additional claims against the Stambler group. I did not participate in and I know that County Dollar and The Title Guarantee Company did not participate in any deliberations leading up to said amended complaint.

What is more, any such counselling, even if admitted, is in no way conspiratorial, is not wrong and does not deprive plaintiffs of their civil or constitutional rights. The important thing is what transpired on the trial of this action before Judge Dillon. The Record on Appeal (Ex. 2) shows conclusively the plaintiffs represented by counsel of their own choice had a fair and impartial trial.

Nor is there any thing wrong or conspiratorial with County Dollar's amendment of its action #3 (Ex. 1) to bring in Peter Wasylee as a party defendant. When Wasylee amended his complaint in action #1 (Ex. 1) against Stambler claiming that if Stambler and his associates had title to the gore area through County Dollar's property they held it for Wasylee's benefit, it was a requisite step in the proper conduct of the County Dollar's action to amend its complaint to bar such claims of Wasylee.

Conclusion

Plaintiffs have not alleged nor can they establish any factual overt acts showing that defendants either conspired or did anything to deprive plaintiffs of their civil or constitutional rights in the State Court litigation. They have had an adequate opportunity to do so. This action was commenced by the filing of the complaint on February 8th, 1968. On October 7, 1968 after motions by defendants to dismiss the complaint, Judge Tenney, by his order dated that day, granted leave to plaintiffs to serve an amended complaint against all defendants even including Judge Dillon. Plaintiffs present amended complaint was not served until December 3rd, 1968 by mail. Plaintiffs have had more than adequate time either to obtain counsel to draw or themselves to draw an adequate amended complaint if such

complaint could be drawn. The facts above show that an adequate complaint cannot be drawn and further show that summary judgment dismissing said amended complaint on the merits should be granted.

Plaintiffs conduct in instituting and continuing this action is nothing but harassment and the wasting of the time of this court. It should be judged in the light of what Judge Wyatt said in his decision herein filed November 8, 1968 denying plaintiffs motion to examine Judge Dillon before trial to enable plaintiffs to amend their complaint. On the last page of his decision Judge Wyatt said:

> "The explanation made above establishes that such motions as the present are harassment to all those concerned. The plaintiffs are taking the time of judges of this Court to deal with essentially frivolous matters to the prejudice of other litigants in this Court. Plaintiffs are strongly advised to desist in such conduct. Continuance can only lead to the imposition of sanctions or the entry of an injunction against plaintiffs or both."

This harassment of defendants by plaintiffs and the waste of time of litigants and the Court should be stopped now. Summary judgment should be granted dismissing plaintiffs' amended complaint on the merits.

All of the plaintiffs and all of the defendants to this action are citizens and residents of the State of New York except the defendant, Gordon who is a citizen of the State of New Jersey. Plaintiffs allege and admit this. Therefore, there is not complete diversity of citizenship sufficient to confer jurisdiction on this Court.

This action was originally brought by Rene Harry Karsten, Esq., an attorney whose office address is now 5 Beekman Street, New York City, New York. Plain-

Affidavit of John C. O'Malley in Support of Motion

tiffs, Stambler, claim that Mr. Karsten has been relieved as their attorney because of ill health but there is nothing of record or served on the attorney for County Dollar Corporation, The Title Guarantee Company and John C. O'Malley, by the corporate plaintiffs relieving Mr. Karsten as their attorney. For that reason notice of this application has been given to Mr. Karsten.

No other application has been made for this or similar relief.

Wherefore, defendants, The Title Guarantee Company, John C. O'Malley and County Dollar Corporation ask that summary judgment be granted herein in their favor dismissing plaintiffs' amended complaint on the merits with costs.

JOHN C. O'MALLEY

Sworn to before me this
12th day of December, 1968.
IRWIN J. WEINSTEIN
Notary Public, State of New York
No. 44-4198775
Qualified in Queens County
Term Expires March 30, 1969

Exhibit 5. Annexed to Affidavit of John C. O'Malley.

LEON J. GREENSPAN

Attorney and Counsellor at Law

199 Main Street

White Plains, N. Y.

WHite Plains 8-1422

Tarrytown Office

154 Martling Avenue

Tarrytown, N. Y.

MEdford 1-1131

August 9, 1962

County Dollar Corporation
25 Milk Street
Boston, Mass.

Gentlemen:

The undersigned has been retained by Empire Park, Inc. with addresses at 199 Main Street, White Plains, N. Y., and c/o Leon J. Greenspan, Esquire. My client has authorized me to instruct you that in order to prevent further trespass it will have no alternative other than to erect a fence which will, unfortunately, block access to the service station.

Enclosed please find survey substantiating ownership of the gore upon which the service station is encroaching and trespassing.

Very truly yours,

LEON J. GREENSPAN

Encs.
LJG:bv

Exhibit 1, Annexed to Affidavit of John C. O'Malley.

SUPREME COURT,

WESTCHESTER COUNTY.

Action No. 1—Index No. 4644/1962

PETER WASYLEC,

Plaintiff-Respondent,

against

SAUL STAMBLER, ROSE STAMBLER, PRUDENTIAL OPERATING Co., Inc. and EMPIRE PARK, Inc., a domestic corporation which was dissolved and EMPIRE PARK, Inc., a domestic corporation,

Defendants-Appellants,

JACK JACOBS, S & H BUILDING CORP., MARCY FINKE, individually, MARCY FINKE, HERBERT TANNENBAUM, DOROTHY RUBIN, DAVID JACOBS and JACK HIRSCH, doing business as S & H Building Co.,

Defendants.

Exhibit 1, Annexed to Affidavit of John C. O'Malley

Action No. 2—Index No. 7840/1962

PRUDENTIAL OPERATING Co., Inc.,

Plaintiff-Appellant,

against

PETER WASYLEC and CROSS-THRU CORPORATION,

Defendants-Respondents,

S & H BUILDING CORP., COSMOPOLITAN EQUITIES, Inc., CROSS-THRU CORPORATION, NEW ENGLAND MUTUAL INSURANCE Co., THE GREAT ATLANTIC & PACIFIC TEA Co., and DOROTHY RUBIN, HERBERT TANNENBAUM, MARCY FINKL, DAVID JACOBS and JACK HIRSCH, doing business as S & H Building Co., a co-partnership,

Defendants.

Action No. 3—Index No. 9934/1962

COUNTY DOLLAR CORPORATION,

Plaintiff-Respondent,

against

EMPIRE PARK, Inc. and PETER WASYLEC,

Defendants-Appellants.

Affidavit of Herman Berniker.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

SAUL STAMBLER and ROSE STAMBLER, individually *et al.*,

Plaintiffs,

against

JOHN J. DILLON, *et al.*,

Defendants.

State of New York,
County of New York, ss:

HERMAN BERNIKER, being duly sworn, deposes and says I am president of the defendant, The Title Guarantee Company and have my office at said defendant's principal place of business located at 120 Broadway, New York City, N. Y. 10005.

I have read the amended complaint of plaintiffs. Paragraph "Thirteenth" thereof is not true. On August 27, 1962 I did meet with Mr. Stambler and Leon J. Greenspan, Esq., his attorney, in Mr. Greenspan's office at White Plains, New York. Immediately following such meeting I made a written memorandum of what transpired at the meeting. A copy of such memorandum marked Exhibit 6 is hereto annexed. The memorandum accurately sets forth the substance of what took place at such meeting and it is in all respects true and correct.

I did not state or offer at such meeting on August 27, 1962 or at any other time or place to procure a discontinuance of the action Wasylec v. Stambler, *et al.* (Action #1, Ex. 1) in return for a deed to the pur-

ported gore area through the County Dollar property. Nor did I or The Title Guarantee Company ever conspire with the defendants or any of them in this action to do anything to deprive plaintiffs of their civil or constitutional rights, nor have I or The Title Guaranty Company ever done anything in the course of State Court litigation herein to prejudice or deprive plaintiffs of their civil or constitutional rights.

HERMAN BERNIKER

Sworn to before me this
12th day of December, 1968.
IRWIN J. WEINSTEIN
Notary Public, State of New York
No. 41-4198775
Qualified in Queens County
Term Expires March 30, 1969

Exhibit 6, Annexed to Affidavit of Herman Berniker.

On August 27, 1962, Mr. Blanco and I called at the offices of Leon J. Greenspan, 199 Main Street, White Plains, New York. Mr. Greenspan said he represented Mr. Stambler (who was present) who is the President of Empire Park Inc. allegedly the owner of a strip which appears to be a "no man's land" lying between two filed maps (1) known as the Pease Estate Map and the other the Empire State Park Subdivision. Also present were Mr. Huck, who is a lawyer and agent for County Dollar Corp., our insureds and the present owners of the Cross County Center. Mr. Geoffrion of the City Title joined the meeting by invitation from Mr. Bianco. Messrs. Stambler and Greenspan stated that unless we were to commence an action against our insured under Policy No. 6080717 (the A & P Parcel) for recision of the policy on the ground of fraud they would erect a fence across the gasoline station site in the Cross County Center. If we would "co-operate", they would "co-operate" with regard to perfecting the title to the Cross County Center Parcel. We made it clear that no such action could or would be taken based on their allegations of fraud stated; and added that we would be interested in acquiring the "outstanding interest" for a sum which would represent the cost of our bringing an action to bar their claim. They answered by saying that the property was not for sale. After considerable discussion Mr. Stambler agreed that he would not erect a fence upon the understanding that we would promptly bring an action to test the question of title to the "no man's land." I indicated that we would arrange to have our Counsel commence work on the preparation of the Complaint.

Earlier in the day, I called Mr. Saul Fromkes of City Title, which Company has co-insured the Cross County Center to advise him of the meeting. I also suggested that Mr. Geoffrion communicate with Mr. Fromkes and give him a report of what happened at the meeting.

Exhibit 6, Annexed to Affidavit of Herman Berniker

P. S. Mr. Stambler called after the conference. He insisted that the Complaint allege that a fence has been erected. Answer "We could not do that. We have no objection to alleging the erection of the fence is threatened." Mr. Stambler said that he will put a post or two on each side of it.

P. P. S. Mr. Greenspan called after Mr. Stambler's last conversation with Mr. Berniker and stated to me that his client was proceeding with the erection of a fence on Wednesday. Tried to contact Mr. Huck but he was not in. Left word that we called and will try again tomorrow.

SUPREME COURT, U.S.

Supreme Court, U.S.
FILED
JAN 18 1971
E. ROBERT SEAVER, CLERK

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1,146

SAUL STAMBLER and ROSE STAMBLER individually and SAUL STAMBLER on behalf of PRUDENTIAL OPERATING CO., INC., and EMPIRE PARK, INC., and ROSE STAMBLER on behalf of EMPIRE PARK INC., (a defunct corporation),

Petitioners,

vs.

JOHN J. DILLON, TITLE GUARANTEE CO., COUNTY DOLLAR CORPORATION, JOHN C. O'MALLEY, PETER WASYLEC, DAVID AVSTREIH, LEONARD WEISS, MARCY FINKE, GEORGE B. GORDON,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR RESPONDENT, MARCY FINKE, IN OPPOSITION

MARCY FINKE
Attorney and Respondent Pro Se
398 Seventh Avenue
New York, N. Y. 10001

BRAND RIVERT — 871-8600 — 971-0470

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In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1,146

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JOHN J. DILLON, TITLE GUARANTEE CO., COUNTY DOLLAR CORPORATION, JOHN C. O'MALLEY, PETER WASYLEC, DAVID AVSTREIH, LEONARD WEISS, MARCY FINKE, GEORGE B. GORDON,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

BRIEF FOR RESPONDENT, MARCY FINKE, IN OPPOSITION

STATEMENT

Commencing with September 23, 1964 and for nine court days thereafter the Hon. John J. Dillon, a Justice of the Supreme Court of the State of New York, heard evidence in three consolidated actions pertaining to title to a tract of land. On April 9, 1965 Justice Dillon rendered his written opinion of some ten typewritten pages in which he found petitioners acquired title by reason of their wrongful acts. Petitioners individually and through their claimed wholly owned corporations voluntarily commenced one of these actions for recession and were represented throughout by two separate and independent counsel. After judgment petitioners perfected two separate appeals wherein Justice Dillon's opinion was unanimously affirmed.

Petitioners next effort was to start an action in the District Court naming as defendants all the attorneys who appeared for the defendants at the trial, and an attorney who appeared only for a witness, three of the original defendants and the Hon. John J. Dillon, the justice, who presided at the nine day trial.

Petitioners charge these defendants with conspiracy and with the violation of their civil and constitutional rights. Petitioners' complaints were dismissed upon motion. Reference is made to the painstaking opinions of the District Judges involved. Far from Petitioners' claim of poor treatment at the hands of the District Judges, more interest was shown in petitioners' submission of affidavits of prejudice against them, which prejudice was non-existent and is perhaps the trademark of this protracted and baseless litigation. Petitioners not only perfected appeals

to the Second Circuit, which affirmed without opinion, but they meanwhile commenced an almost identical proceeding through their claimed wholly owned corporations for almost identical relief to the Supreme Court, Westchester County. Upon denial of that application, petitioners perfected an appeal therefrom to the Appellate Division, where it is now pending. Petitioners also make this application for a writ to the Second Circuit Court of Appeals.

ARGUMENT

The basis of any claim which Petitioners' ingenuity is able to conjure up depends on the nine day trial before Mr. Justice Dillon. The minutes of this trial consisting of four bulky printed volumes was delivered to the District and Circuit Courts. Voluminious and contradictory testimony is contained therein. Even a cursory reading of the same establishes that there is good and substantial ground for the findings of fact and conclusions of law contained in Judge Dillon's opinion, which must be read.

The following analysis of petitioners' claims indicates that he discounts completely the events and testimony of the nine day trial and is hopefully looking for yet another chance to detail his version of how he acquired the real estate Judge Dillon held he could not keep. The only way he can convince the District Court to hear the same issues decided by the New York Courts is to make wild, reckless and unsupported accusations against the participants. This is an ancient custom indulged in by unprincipled litigious people.

QUESTIONS PRESENTED

Petitioner claims to be aggrieved that the United States District Court refused to hear his complaint that the evidence was contrary to the finding of the Supreme Court of New York that he was a wrongdoer — (Question 1) that he was denied a trial on the merits as to the judicial immunity of the trial justice who presided (Question 2) that the District Court held his complaint frivolous against the trial justice as evidence of "purposeful discrimination" because of his finding of petitioners wrongdoing (Question 3). That the District Court declined to hear that the trial justice legislated a bill of attainder against petitioners despite the fact that petitioners claimed there was no evidence of wrongdoing (Question 4). That the District Court declined petitioners the opportunity to present testimony that the trial justice was acting without jurisdiction (although petitioners through their claimed corporations invoked that jurisdiction (Question 5).

That the District Judges for different reasons declined to reverse the findings made by the trial justice (Question 6). That the District Court declined to find that petitioners' civil rights and constitutional rights were violated by the trial justice who refused to limit the imposition of only a constructive trust against the petitioners who were wrongdoers but not fiduciaries (Question 7). Whether the District Court was in error when it held frivolous petitioners' claim that by the trial justice finding that the return of the land acquired by petitioners was involuntary servitude in violation of the Fourteenth Amendment (Question 8).

That the District Court erred in denying a trial on the merits on a charge of conspiracy where the overt act alleged was that of converting a vendor purchaser relationship into one of master and servant thereby denying petitioners due process (Question 9). Whether the District Court rightfully dismissed the complaint brought by reason of the claimed violation of the Thirteenth and Fourteenth Amendments thus denying petitioners due process (Question 10).

Whether the District Court rightfully dismissed petitioners' complaint brought under 42 USC 1981 by reason of petitioners' claim that the trial justice made findings contrary to the evidence (Question 11).

Whether the District Court properly dismissed petitioners' complaint that the trial justice made findings where the jurisdiction of his court had not been invoked in violation of the Thirteenth and Fourteenth Amendments and 42 USC 1983, 1985 and 1994 (Question 12).

Whether as petitioners claim the opinions of the District Court are so inconsistent as to require this court to supervise them (Question 13).

Whether the District Court was in error in refusing to permit additional amended complaints to be served (Question 14).

Whether the District Court erred in depriving petitioners of their rights to a trial based on claimed conspiracy thus depriving them of their property without due process (Question 15).

Whether the District Court erred in dismissing petitioners' complaint based on conspiracy alleging that the trial justice exceeded his jurisdiction and made findings contrary to the evidence and declared petitioners a wrongdoer and refused petitioners to profit by their wrongful acts thus depriving petitioners of their property (Question 16).

Whether the District Court was right to deny petitioners the further right to amend their complaint "to allege action pursuant to state law" * * "and thereby show that the state action necessary for relief under the Fourteenth Amendment and 42 USC 1983" (Question 17).

POINT I

THERE ARE NO FACTS PRESENTED TO GRANT THE WRIT.

If petitioners are sincere in their argument that the Courts of the State of New York deprived them of anything other than the property they illegally acquired, they should have filed their application for a writ to this court, within the time limited therefore. They did not do so. Instead they complain that the District Court by its refusal to embrace defective complaints has succeeded in depriving them of rights which until Judge Dillon's decision and its affirmance are set aside are non existent.

Whether or not petitioners deliberately declined to petition this court for a writ after the Court of Appeals of the State of New York unanimously affirmed Judge

Dillon's decision because of the ruling of this court in *Aleinikoff v. Lauenstein*, 232 U.S. 241, which accepts as binding, findings upon issues of fact duly made in that court, the time within which to apply for such writ has long since expired (Rule 22).

The Plaintiff in *Wood v. Conneaut Lake Park, Inc.*, 386 F.2d 121 sought the aid of the Federal Courts to vacate an order of the Pennsylvania Supreme Court. The Third Circuit there held that even if the verdict was erroneous, as long as such judgment was not without foundation, a due process violation was not shown and since there was no arbitrary action under the evidence the District Court was without jurisdiction to entertain the suit, since there was no Fourteenth Amendment violation and no due process violation. Certiorari was denied. 391 U.S. 907, 20 L.Ed. 422.

An analysis has been made of the Questions Petitioners claim are presented by this Appeal. They relate uniformly to the events at the trial before Judge Dillon and his decision. Petitioners have deliberately refused to address themselves to the complaint they were authorized to amend and any amendment they intend to re-plead. Petitioners believe that their arguments they claim Judge Dillon's decision results in, substitute for the facts they are required to plead to constitute a good and valid complaint before this court. Nor may it be urged that their affidavits of prejudice are an equal substitute for complying with the orders of the District Court to prepare a valid pleading. The District Courts requirements may not be avoided by Petitioners' arguments that Judge Dillon's decision is wrong and that this Court must correct it.

Petitioners' baseless charges that their civil rights have been infringed has been painstakingly analyzed by the late Judge Herlands.

Petitioners having lost their case are seeking the excercise by the District Court of appellate jurisdiction of the case tried before Judge Dillon. This they may not do.

This answering respondent is especially concerned with the ability of an individual such as petitioner to harass him beyond all measure for which there is no available relief. For petitioners through their claimed wholly owned corporations (where they once claimed title lay) and their voluntary appointed and designated attorneys appearing in open court before Judge Dillon, stipulated on the record to discontinue all actions brought by petitioners as aforesaid, against this respondent.

CONCLUSION

The petition for a writ should be denied.

Respectfully submitted,

MARCY FINKE
Attorney and Respondent Pro Se
393 Seventh Avenue
New York, N. Y. 10001

LIBRARY
SUPREME COURT, U. S.

FILED
JAN 28 1971

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1146

SAUL STAMMAN and ROSE STAMMAN, individually, and SAUL STAMMAN on behalf of Prudential Operating Co., Inc., and Empire Park Inc., and ROSE STAMMAN on behalf of Empire Park Inc. (a defunct corporation),

Petitioners,

against

JOHN J. DILLON, TITLE GUARANTEE CO., COUNTY DOLLAR CORPORATION, JOHN C. O'MALLEY, PETER WASYLEC, DAVID AUSTERLIN, LEONARD WEISS, MARCY FINKS, GEORGE B. GORDON,

Respondents.

BRIEF OF RESPONDENT JOHN J. DILLON IN OPPOSITION TO WRIT OF CERTIORARI

LOUIS J. LEFKOWITZ
Attorney General of the
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Attorney for Respondent
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In the

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1146

SAUL STAMBLER and ROSE STAMBLER, individually, and SAUL STAMBLER on behalf of Prudential Operating Co., Inc., and Empire Park Inc., and ROSE STAMBLER on behalf of Empire Park Inc. (a defunct corporation),

Petitioners,

against

JOHN J. DILLON, TITLE GUARANTEE CO., COUNTY DOLLAR CORPORATION, JOHN C. O'MALLEY, PETER WASYLEC, DAVID AUSTERER, LEONARD WEISS, MARCY FINKE, GEORGE B. GORDON,

Respondents.

BRIEF OF RESPONDENT JOHN J. DILLON IN OPPOSITION TO WRIT OF CERTIORARI

Statement

This is an application for a writ of certiorari by the plaintiffs Stambler. They desire to appeal from:

1. A judgment of Hon. William B. Herlands, United States District Judge entered June 23, 1969, dismissing plaintiffs' amended complaint for failure to state a cause of action against any of the defendants (B-5)*:

* Letters and numbers in parentheses are to pages of Petitioners' Appendix.

2. An order of Hon. Inzer B. Wyatt, United States District Judge dated October 24, 1989, denying plaintiffs' motion to amend Judge Herlands' judgment of June 23, 1989, to permit the service by plaintiffs of a second amended complaint (B-13);

3. An order of Hon. Inzer B. Wyatt, United States District Judge, dated December 1, 1989, denying plaintiffs' motion to re-argue the motion for leave to serve a second amended complaint; and,

4. An order and judgment of the United States Court of Appeals, Second Circuit, affirming the judgment of dismissal of Judge Herlands and post judgment orders (B-20).

Issues Presented Below

1. Does plaintiffs' amended complaint state a claim against defendant Dillon upon which relief can be granted?

2. On the record before the Court are plaintiffs entitled to leave to serve a second amended complaint herein?

History

In April 1980, respondent Wasylow contracted to sell a parcel of real property in the City of Yonkers to one Herbert Tannenbaum for $130,000. Respondent Finke, an attorney, representing Tannenbaum ordered a title policy from respondent Title Guarantee Company. A search disclosed a defect in title consisting of a gore or strip of land running through the property of Wasylow and the adjoining property owned by respondent County Dollar Corporation.

The defects apparently occurred in descriptions in prior conveyances drawn after both properties had been acquired by the City of Yonkers through in rem tax foreclosure, sale and judgment.

When Finke advised Wasylee of the problem, Wasylee proceeded to obtain a quit claim deed from the survivors of the deceased owner of all but the organizational stock of appellant Empire Park, Inc., the former owner. Title Guarantee Company considered this deed insufficient to overcome its objection to the title.

In November 1960, Finke spoke to one Jack Jacobs, who was president and sole stockholder of Prudential Abstract Co., Inc., which had made a prior search which had failed to uncover the gore. Jacobs recommended petitioner Saul Stambler to Finke as an experienced man in this field.

Prior thereto, on September 8, 1960, by letter, Title Guarantee had advised Finke that title to the gore was vested in Empire Park, Inc. under a deed from one, Ann N. Sawyer dated November 14, 1924; and that Empire Park, Inc. had been dissolved in 1938. Stambler was furnished with this information including the fact that the former president of the corporation had died survived by a spouse and a son, the appellee George B. Gordon.

Stambler communicated with Gordon, representing himself to be an officer of a title company which had been hired by Wasylee to clear title to Wasylee's property. On November 30, 1960, he wrote to Gordon on the stationery of Jacobs' firm, the Prudential Abstract Co., Inc., enclosing an affidavit for Gordon and an assignment of stock of Empire Park, Inc. to be executed by Gordon's mother to appellant Rose Stambler who is Stambler's wife. When Gordon asked why the assignment was made out to his wife, Stambler said it was a matter of convenience.

Stambler was neither an officer nor an employee of Prudential Abstract Co., Inc. Gordon stated that he would not have executed the affidavit nor would he have advised his mother to execute the assignment of stock except for Stambler's misrepresentation which he believed to be true.

Stambler also obtained an affidavit and assignment of stock from one Sadie Schachner. That affidavit as well as the Gordon affidavit states that the stock assignment was

made in order "to aid *interested parties* to cure defects in title to lands formerly owned by Empire Park, Inc."

On December 31, 1960, Rose Stambler, as "sole surviving director" of Empire Park, Inc. executed a quit claim deed which purported to convey the gore to Prudential Operating Co., Inc.

Wasylec, at this stage, was unable to convey title to the property in accordance with the contract of sale which provided for a title "such as any approved title company will approve and insure". Wasylec was also being sued by the real estate broker who had negotiated the sale for $6,500 in commissions.

Under these circumstances Wasylec agreed with Stambler to pay $15,000 for a conveyance of the gore which ran through his property. A title closing was held on June 26, 1961, at which Prudential Operating Co., Inc. conveyed the necessary portion of the gore to Wasylec for $15,000 and Wasylec simultaneously conveyed his property to Tannenbaum in accordance with the contract of sale.

As Stambler was leaving the closing he was served with process in which Wasylec asked for the return of the $15,000 from Stambler and his wife, Jacobs, Prudential Operating Co., Inc. and Empire Park, Inc. He also named Finke, Tannenbaum and others interested in the purchase of his property as party defendants. In addition, Wasylec asked that the Court impress an equitable or constructive trust in his favor on the remainder of the gore—the portion running through the property owned by respondent County Dollar Corporation.

Subsequently, two other actions were commenced one by County Dollar Corporation pursuant to Article 15 of the New York Real Property Actions and Proceedings Law against Empire Park, Inc. and Wasylec barring them from all claims to the County Dollar property and clearing its title, and another by Prudential Operating Co., Inc.,

against Wasylee and others to set aside the conveyance of the gore on the theory of fraud and for $1,000,000 in damages.

These three actions were consolidated and tried before Justice Dillon.

Upon the above facts, as well as others, Justice Dillon decided that Stambler had no right to act for himself and to acquire title to the gore. He went on to say, "It is well established that when a person acquires title to property through a scheme of deceit and fraud, as in the instant case, the court will not permit him to retain the fruits of the wrong but will impress a constructive trust upon the property in favor of those who in good conscience are entitled to the property" (citing cases).

Justice Dillon, in his decision, noted that Mrs. Gordon and Mrs. Schachner were not parties in the actions before him but nevertheless he was of the opinion that the doctrine enunciated in the cases he cited "should be utilized to protect the interests of those persons who actually sustained damages because of Stambler's wrongful acts. In support of his conclusion he cited *Bron* v. *Weintrab*, 42 N. J. 87, which relied on *Latham* v. *Father Divine*, 299 N. Y. 22, where the New York Court of Appeals held that the concept of a constructive trust "is limited only by the inventiveness of men who find new ways to enrich themselves unjustly by grasping what should not belong to them."

Justice Dillon determined that "it would be grossly unfair and contrary to public policy to permit Stambler and his associates to retain the unconscionable consideration exacted from Wasylee." He granted judgment to County Dollar Corporation clearing its title and dismissed the action by Prudential Operating Co., Inc.*

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* The entire recitation of events summarized above is contained in the decision rendered by Justice Dillon after trial (C15-C24).

Judgments were entered in each case. On appeal to the Appellate Division, Second Department, all judgments were affirmed 28 A. D. 2d 825; 28 A. D. 2d 822; 28 A. D. 2d 824 (1967). Appeals were taken to the New York Court of Appeals, which, on November 2, 1967, granted motions to dismiss the appeals. 20 N. Y. 2d 803.

Proceedings Below

An action was commenced on February 8, 1968, against the respondents by the following plaintiffs: Saul Stambler, Rose Stambler, Empire Park, Inc. (a defunct corporation), Empire Park, Inc. and Prudential Operating Co., Inc. The plaintiffs were all represented by Rene Harry Karsten, Esq., 5 Beekman Street, New York, New York. On July 5, 1968 plaintiff Saul Stambler filed a notice that Mr. Karsten was relieved and that the plaintiffs were proceeding pro se.

The complaint founded on 28 U.S.C. 1331, 1332 and 1333, 42 U.S.C. 1981, 82, 83, 85 and 86; and 2201 and 2202, alleged:

That pursuant to a conspiracy to deny plaintiffs their constitutionally guaranteed rights, the defendants conspired to perform certain acts leading to and including lawsuits against the plaintiffs (pars. 9, 10 and 11, pp. 9 and 10); that Justice Dillon consolidated the matters for trial and forced plaintiffs to trial (pars. 13-15, p. 10); that the trial was unfair (par. 16, p. 10); that Justice Dillon found plaintiff Stambler guilty of "fraud and deceit" (par. 17, p. 11) allegedly a crime under Article 86 of the New York Penal Law (See decision, Exhibit "B", pp. 7, 9) and that Justice Dillon had no jurisdiction to try plaintiff Stambler on the crime charged (pars. 18-22, pp. 11-12). These latter allegations respecting a so-called criminal charge, represented, it seems, the pleaders' literary license. There were no criminal charges pending against Stambler. The only

trial before Mr. Justice Dillon was the consolidated trial described above and the only decision was the one rendered in that trial in the course of which, as the decision noted, the Court found that Stambler had practiced fraud and deceit.

Petitioners concluded that this alleged conspiracy deprived them of their right to be indicted by a Grand Jury (par. 24, p. 12).

Justice Dillon moved to dismiss the complaint pursuant to Rule 12(a) (1, 2 and 6) and for summary judgment pursuant to Rule 56(b) of the Federal Rules of Civil Procedure. The motion came on before Judge McGohey who treated the motion as one for summary judgment and dismissed the complaint saying that the complaint "does no more than charge Justice Dillon in the most general terms with participation in the alleged conspiracy. This is not enough . . . the complaint shows only that the Judge performed the normal duties of his office . . . ." (31-4).

In the course of his opinion Judge McGohey expressed the opinion that since no damages were sought against Justice Dillon, the doctrine of judicial immunity does not apply, relying on *United States* v. *Clark*, 249 F. Supp. 720, 727 (S. D. Ala. 1965).

Petitioners then moved for leave to amend the judgment of dismissal for leave to serve an amended complaint upon all parties and for permission to take testimony of the defendants pursuant to Rule 26. The remaining defendants (other than Judge Dillon) moved to dismiss the original complaint as to them.

Judge Tenney, in a memorandum order dated October 7, 1968, granted the motion to amend as to the individual plaintiffs but dismissed the complaint as to the corporate plaintiffs under the "well established" rule that a corporation cannot appear other than by an attorney.

Judge Tenney, after observing that Judge McGohey had stated that "the court clearly has jurisdiction of the ac-

tion as against Justice Dillon under Section 1343 of Title 28 U.S.C." before he dismissed the complaint for failure to allege a cause of action, granted leave to serve an amended complaint and pertinently stated that he "expressed no opinion as to whether plaintiffs can eventually state a cause of action". Leave to take the deposition was denied as premature (78).

Then the individual plaintiffs, Saul and Rose Stambler, on behalf of themselves and the corporate plaintiffs, moved to take the oral testimony of Justice Dillon pursuant to Rule 26(a) of the Federal Rules to enable them to "properly frame the amended complaint". This motion came on before Judge Wyatt. He denied the application in a memorandum order dated November 9, 1968 (87-89) saying:

> "There is no authority . . . for any such deposition. Even if such a deposition were authorized, it is clear that it ought not to be permitted here. There can be no possible claim against Mr. Justice Dillon. As the complaint properly recognized, he is absolutely immune. *Bradley* v. *Fisher*, 80 U. S. 335 (1871).)
>
> The explanation made above establishes that such motions as the present are harassment to all those concerned. The plaintiffs are taking the time of judges of this Court to deal with essentially frivolous matters to the prejudice of other litigants in this Court. Plaintiffs are strongly advised to desist in such conduct. Continuance can only lead to the imposition of sanctions or the entry of an injunction against plaintiffs or both."

On December 5, 1968, the individual plaintiffs served a notice of appeal from Judge Wyatt's decision and order. No appeal was taken.

The individual plaintiffs then served an amended complaint on or about November 27, 1968 in which they pur-

ported to sue on behalf of the three named corporations as well as for themselves (C1).

Justice Dillon, as well as the other named defendants, moved to dismiss the amended complaint. This motion came on before Judge Herlands. Justice Dillon contended that petitioners had again failed to set forth any facts which would constitute a cause of action. The complaint simply attempted to analyze Justice Dillon's decision; argue that he was wrong and that he reached the wrong conclusion as a result of a conspiracy with all the other persons involved in the litigation. It was pointed out that this was exactly the kind of complaint rejected in *Powell v. Workmen's Compensation Board of the State of New York*, 327 F. 2d 131, 137-138 (1964). It was also again submitted that Justice Dillon had absolute immunity under the authority of *Pierson v. Ray*, 386 U. S. 547 and *Morgan v. Sylvester*, 125 F. Supp. 380 (S.D.N.Y. 1964), aff'd 220 F. 2d 758 (2d Cir. 1958), cert. den. 350 U. S. 867.

The amended complaint alleged that jurisdiction over Justice Dillon was based on the exception to the doctrine of judicial immunity recognized in *Bradley v. Fisher*, 80 U. S. 335, 351 (1871-2).

In that case this Court said:

> "... judges of courts of superior or general jurisdiction are not liable to civil action for their judicial acts, even when such acts are in excess of jurisdiction, and are alleged to have been done maliciously or corruptly. A distinction must be here observed between exercise of jurisdiction and the clear absence of all jurisdiction over the subject matter."

Petitioners, in this contention, totally ignored Judge Wyatt's holding of November 8, 1968 that Justice Dillon had jurisdiction of the subject matter.

Judge Herlands dismissed the amended complaint on June 23, 1969 (29-43) holding that Justice Dillon is im-

mune from any liability under the Civil Rights Act and that no cause of action is asserted under *United States* v. *Clark*, 249 F. Supp. 720 (S. D. Ala. 1965), where he acts within the scope of his judicial duties as he did in this case and was not, in so doing, violating any federally protected right (B9).

Petitioners then moved for an order to amend Judge Herlands' judgment of dismissal entered June 23, 1969 to permit the service of a further amended complaint and to permit the taking of a deposition of Mr. Justice Dillon. The motion was referred to Judge Herlands. After his passing the motion was transferred to Judge Wyatt by order of the Chief Judge on October 9, 1969.

Judge Wyatt denied the motion on the law and in the exercise of discretion (B18) saying among other things:

> "This motion and the action itself are notably lacking in merit but the frivolous and harassing character of the litigation furnishes a depressing example of the waste of the time of many judges (and their supporting staffs) to the prejudice of other litigants with serious questions to be resolved (B14). . . . Judge Herlands stated that the action was 'unfounded and has probably been maintained in bad faith', that plaintiffs made 'reckless accusations' and that the action was 'indeed baseless'." (B18)

Undaunted, petitioners moved to reargue that motion. Judge Wyatt, of course, on December 1, 1969 denied the application "as frivolous and without merit and in violation of the order that plaintiffs made no further motion or applications to this court except in connection with any appeal to the Court of Appeals".

On September 23, 1970, the Court of Appeals for the Second Circuit (Waterman, Moore, Kaufman, C.J.J.) unanimously affirmed the judgment dismissing petitioners' amended complaint and the post judgment orders denying petitioners' post judgment motions (B20-22).

POINT I

Respondent Dillon, as a Justice of the Supreme Court of the State of New York, is entitled to absolute immunity from all civil suits, including civil rights actions, in the exercise of his vested judicial authority.

A Justice of the Supreme Court of the State of New York has general jurisdiction in law and equity. New York State Constitution Art. 6, Sec. 1. The actions which were tried and decided by Justice Dillon about which appellants complain were undoubtedly within the jurisdiction of the State Supreme Court. It was recognized in *Bradley* v. *Fisher*, 80 U. S. 335, 347 (1872), that:

> "• • • [I]t is a general principle of the highest importance to the proper administration of justice that a judicial officer, in exercising the authority vested in him, shall be free to act upon his own convictions, without apprehension of personal consequences to himself. Liability to answer to everyone who might feel himself aggrieved by the action of the judge, would be inconsistent with the possession of this freedom, and *would destroy that independence without which no judiciary can be either respectable or useful.*" (Emphasis added.)

That principle has received general acceptance. *Pierson* v. *Ray*, 386 U. S. 547 (1967); *Fasale* v. *Sheehy*, 385 F. 2d 866 (2d Cir. 1967); *Morgan* v. *Sylvester*, 125 F. Supp. 380 (S.D.N.Y. 1964), aff'd 220 F. 2d 758 (2d Cir. 1955), cert. den. 350 U. S. 867 (1960).

In *Pierson* v. *Ray*, *supra*, this Court said (p. 554):

> "It is a judge's duty to decide all cases within his jurisdiction that are brought before him, including controversial cases that arouse the most intense feelings in the litigants. His errors may be corrected on

> appeal, but he should not have to fear that unsatisfied litigants may hound him with litigation charging malice or corruption. Imposing such a burden on judges would contribute not to principled and fearless decision-making but to intimidation."

Petitioners sought to avoid the impact of this fundamental principle by joining Justice Dillon as a defendant in this tort action for damages without seeking damages from him (52). This was nothing but a clever ploy that cannot be sanctioned as a permissible avoidance of the clear expression of judicial immunity from civil suits. The essence of the principle is founded upon the proposition that a judge should not be required to engage in litigation with "unsatisfied litigants". *Pierson v. Ray, supra.* That immunity cannot be circumvented by simply failing to ask for damages, but nevertheless, compelling a judge to enter into a contest to justify his determination.

Petitioners might argue that in addition to their claim for damages, they are seeking a judgment from the federal court declaring the judgment rendered by Justice Dillon on April 22, 1965 to be null and void by reason of a lack of jurisdiction (59). However, this request for relief cannot support a suit against Justice Dillon. An attack against the judgment of the court for lack of jurisdiction is not one which requires personal defense by the judge rendering the judgment.

Moreover, jurisdiction is primarily determined by the court itself subject to review by appellate courts. Certainly the federal court should not be asked to decide by way of a declaratory judgment whether the state court had jurisdiction over the subject matter in litigation in that court. In fact, that the Supreme Court of the State of New York had jurisdiction over the litigation which resulted in Justice Dillon's decision is so evident that discussion is pointless.

In the amended complaint appellants alleged that Mrs. Gordon and Mrs. Schachner were not parties to the litigation and, since Justice Dillon acknowledged that fact, he had no jurisdiction over the subject matter of the action, and, therefore, knowingly exceeded his jurisdiction in ruling that the title to the property was in Wasylee and County Dollar Corporation (C9-10). Such a claim is simply without any merit. Even if there were a question whether the property rights of Mrs. Gordon and Mrs. Schachner were affected by Justice Dillon's decision, it is perfectly clear that the court was not precluded from deciding the rights and interests of the appellants who were before the court. Only Mrs. Gordon and Mrs. Schachner could possibly claim that they were not bound by the judgment.

The "subject matter" argument was contrived out of appellants' attempt to come within the exception to immunity noted in *Bradley v. Fisher, supra*, 80 U. S. 335 where this Court noted: "A distinction must be here observed between excess of jurisdiction and clear absence of all jurisdiction over the *subject matter*" (pp. 351-352). This Court said that where there was clearly no jurisdiction over the *subject matter*, immunity would not enure. As an example, the Court posed a situation where a probate court with authority only over wills and settlements of estates of deceased persons should proceed to try parties and public offenses when there was no such jurisdiction in the court. This analogy bears no relation to the lawsuits decided by Justice Dillon.

Petitioners contend that since Judge McGohey had taken the position that the federal court has jurisdiction of the action as against Justice Dillon under Section 1343 of Title 28 U. S. C., that this became the law of the case and other judges of the district court should be bound thereby. Again appellants are mistaken and are attempting to employ artful confusion. Judge McGohey treated the motion to dismiss the complaint as a motion for summary judg-

ment and dismissed the complaint holding that "the complaint fails to allege sufficient facts to show that Justice Dillon was part of any such conspiracy if one existed. The complaint does no more than charge Justice Dillon in the most general terms with participation in the alleged conspiracy. This is not enough . . . the complaint shows only that the judge performed the normal duties of his office in the trial and decision of the issues in a strongly contested litigation" (134).

Having dismissed the complaint there was no action pending against Justice Dillon and there was no way to review Judge Metzbaw's opinion that Justice Dillon could be sued.

When Judge Timmy permitted appellants to serve an amended complaint, no one could know what a new complaint would allege or whom the appellants would include as plaintiffs or defendants.

The motion to dismiss the amended complaint decided by Judge Herlands dealt with an entirely new complaint. Under these circumstances Judge Herlands was not bound by Judge Metzbaw's dictum. Moreover, Judge Herlands assumed jurisdiction under Section 1343 "to determine whether plaintiffs have stated a claim for relief" (139). He concluded that Justice Dillon is immune from liability under the Civil Rights Act (1510) noting *United States v. Clark*, 240 F. Supp. 721 (S. D. Ala. 1965), upon which Judge Metzbaw relied. He concluded that "it appears beyond doubt that plaintiffs can prove no set of facts to support their allegations of state action" (1510). Judge Herlands further observed that the characterizations of the defendants as "conspiratorial" and "malicious" is "not supported by any facts, and none of the overt acts which the amended complaint sets forth warrants an inference that a conspiracy existed whose purpose was to obstruct justice or to deny plaintiffs the equal protection of the laws" (1511).

Judge Wyatt was equally convinced that appellant had no cause of action (1318) as was a unanimous Court of Appeals.

It is submitted that any reliance on *United States* v. *Clark, supra*, was misplaced. That case is readily distinguishable. In *Clark*, the court said that the federal court had the power to enjoin state officials, including judges, from interfering with the federally guaranteed voting rights of Alabama citizens under color of state law. The action before Justice Dillon did not involve the deprivation of a federally protected right and equally important, he had long since ended his judicial function when this action was begun. Judgment was entered in the state courts on April 22, 1965 (59). The original action herein was commenced on February 8, 1968. He was *functis officio*. *Vogel* v. *Edwards*, 283 N. Y. 118, 121 (1940). There was nothing for the federal court to enjoin Justice Dillon from doing.

POINT II

An action under the Civil Rights Act may not be used as a subterfuge for obtaining a review and retrial of state court proceedings.

These petitioners have availed themselves of their appellate rights in the New York State courts and have been unsuccessful. If Justice Dillon lacked jurisdiction to render a judgment, that could have been urged in the New York Appellate Courts.

This gambit is not new. In rejecting a claim of conspiracy, the Court, in *Powell* v. *Workmen's Compensation Board of the State of New York*, 327 F. 2d 131 (1964), said (p. 127): "The allegations contained in the complaint indicate no more than the action of several interested parties . . . who sought vigorously to protect their own interests, coupled with the normal [legal] processes of adjudication and appeal. Indeed, were we to hold this com-

plaint sufficient, we would be inviting every party to a state proceeding . . . to file a complaint in this Court reciting the history of his state case and concluding with a general allegation of conspiracy."

Similarly, in *Morgan v. Sylvester*, 125 F. Supp. 380, 387 aff'd 220 F. 2d 758 (2d Cir. 1955), cert. den. 350 U. S. 867, it was said this way:

> "This action is a clear attempt, despite plaintiff's assertion to the contrary, to obtain a review and a retrial of the State Court proceedings. The fact that a defeated litigant is prepared to charge a 'conspiracy' recklessly or otherwise and recite in haec verba the language of the Civil Rights Act does not give a right of review in the Federal Courts. To uphold the claim here advanced upon such conclusory allegations 'would open the door wide to every aggrieved litigant in a state court proceedings, and set the federal courts up as an arbiter of the correctness of every state decision.'
>
> This case demonstrates forcibly the wisdom of the public policy which grants immunity to judicial and other officials for acts performed in the discharge of their duties. If in circumstances such as this defendants may be made to answer for their determinations, not only would the independence of the judiciary be undermined, but a ready means would be at hand to paralyze the entire judicial system."

POINT III

Assuming that Justice Dillon is subject to suit, the record facts fully justified the dismissal of the original complaint by Judge McGohey, the dismissal of the amended complaint by Judge Herlands and the denial by Judge Wyatt, as a matter of law and in the exercise of discretion, of any further attempts to serve another complaint.

It is unnecessary to burden this Court further with repetitive argument. Every judge who has had this matter before him has indicated that the circumstances of the action and the decision rendered by Justice Dillon after trial do not and cannot form the basis of a conspiracy.

A reading of the amended complaint illustrates that this is exactly what these petitioners have been attempting to do. There is no reason to prolong this interminable litigation. It is strongly, but respectfully, suggested that this Court put a note of finality to this vexation and harassment of Mr. Justice Dillon by these petitioners.

CONCLUSION

Certiorari should be denied.

Dated: New York, New York,

Respectfully submitted,

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